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17 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1907; NUMBER

IN THE MATTER
of
ALBERT N. MOORE, an Infant,
by next friend, Petitioner.

PETITION FOR WRIT OF MANDAMUS

THOMAS T. FAUNTLEROY
SHEPARD BARCLAY
Attorneys and of Counsel for Petitioner

(No.)

ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1907

IN THE MATTER
of
ALBERT N. MOORE, an Infant,
by next friend, Petitioner.

PETITION FOR WRIT OF MANDAMUS

To the Honorable, the Chief Justice and the Justices of the United States Supreme Court:

The petition of Albert Newton Moore, by next friend, to the Honorable, the Supreme Court of the United States, respectfully showeth:

That your petitioner, Albert Newton Moore, **is now** and has been for several years last past **a citizen and resident of the State of Illinois,** and that he is now (and was at all the dates hereinafter named) **an infant under the age of twenty-one years,** and being such infant, George Safford was duly appointed as next friend

of your petitioner by the Circuit Court of the City of St. Louis, Missouri, in accordance with the laws of Missouri in such case made and provided; and thereupon your petitioner as plaintiff began an action at law, November 16th, 1906, by his said next friend, against The Louisville & Nashville Railroad Company, as defendant, in one of the said courts of the State of Missouri, namely, The Circuit Court in the City of St. Louis, which said action was for serious personal injuries sustained by your petitioner in the City of Mt. Vernon, State of Illinois, as will appear by a copy of said petition as filed in said Circuit Court, City of St. Louis, Missouri, which will be submitted herewith to your Honors, as part of the complete transcript of the record of proceedings in said cause.

Upon the filing of said petition a writ of summons (directed to said defendant in the usual way) out of said Circuit Court, City of St. Louis, was issued, and duly served, November 17, 1906, upon the defendant, The Louisville & Nashville Railroad Company, by delivering a copy of the writ and petition as furnished by the clerk to John Fitzgerald, superintendent of said defendant corporation, he being in said defendant's usual business office and in charge thereof; the president or other chief officer of said defendant could not be found in the City of St. Louis at the time of service, according to the return of the sheriff of said city upon said writ of summons, duly made in accordance with the law of Missouri; and whereby said State Circuit Court acquired personal jurisdiction over said defendant corporation which then was, and had long been, at the time said action was begun, a corporation incorporated under the laws of the State of Kentucky and a citizen and resident of said latter State.

Your petitioner further avers that, at the return (December) term of said Circuit Court, City of St. Louis, 1906, the defendant, said Railroad Company, filed in said action in said State Court, **a petition for removal thereof** to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, a copy of which petition appears in full as part of the duly certified transcript of proceedings in said cause (submitted herewith to your Honors) whereby it appears, in accordance with the facts, that your petitioner then and at the time when the petition in said action was filed, was **a citizen and resident of the State of Illinois,** and that said defendant, said railroad company, then, and at the time when said action was commenced, was a corporation organized and existing under the laws of the **State of Kentucky, and a citizen and resident of said State;** and that **neither plaintiff nor defendant was then,** or at the time when said action was commenced, **a citizen or resident of the State of Missouri.**

It appeared, furthermore, affirmatively, from said petition for removal, that no federal question or cause of action arising under the Constitution or laws of the United States was claimed to be involved in said action, and that the sole ground upon which the said removal of said cause to the United States Circuit Court was claimed by defendant, was on the supposed, but (as your petitioner is advised and believes) mistaken and erroneous grouud of the citizenship of the parties as above stated.

Whereupon said State Circuit Court in the City of St. Louis, at the December Term, 1906, on December 5th, 1906, approved the bond offered by said defendant

to said Court at the time when said petition for removal was presented, and entered an order that the Clerk of said State Circuit Court certify a transcript of the proceedings in said cause, forthwith, to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, which was accordingly done, and a duly certified transcript of said proceedings was filed in the office of the Clerk of said Circuit Court of the United States, January 31st, 1907.

Your petitioner further avers that, March 22, 1907, an amended petition was filed in his behalf in said cause in the United States Circuit Court aforesaid, and on the 26th day of October, 1907, your petitioner filed **a motion to remand** said cause to the State Circuit Court in the City of St. Louis, on the ground that said United States Circuit Court was **"without jurisdiction to hear and determine the case"**. Said motion to remand was overruled by the Court, November 2, 1907, and exception to said ruling duly taken and allowed at the time; and a **motion to reconsider said ruling** was filed by your petitioner, November 19, 1907, which motion was substantially as follows:

(Omitting caption and signature)

"Comes now the plaintiff, etc., * * * and asks the Court to reconsider its ruling on plaintiff's motion to remand for the reason that the Court erred in refusing to remand said cause from the federal court to the State court and in holding that the plaintiff had waived his objections to the jurisdiction of the federal court and had entered a general appearance in said federal court, **since the plaintiff, being an infant, could not waive any question of jurisdiction either by himself or by his next friend,** and plaintiff asks the Court to consider plaintiff's brief on the subject of waiver by an infant and his next friend herewith filed."

This last described motion was likewise overruled by said Circuit Court of the United States, and exception duly taken and allowed thereto at the time; and said exceptions were duly preserved and recorded by a bill of exceptions in said cause, duly allowed, signed, sealed and made part of the record therein, by the Honorable Judge then and there presiding in said Circuit Court of the United States, which bill was duly filed therein in said court at the same September Term, 1907, thereof, November 19th, 1907, as your petitioner is informed and verily believes.

The premises considered, your petitioner avers that he is advised that said Circuit Court of the United States is without jurisdiction to proceed in said cause, or to entertain and adjudicate the cause of action of your petitioner as presented by the pending petition therein, which states a cause of action which said Circuit Court has no power or jurisdiction to adjudicate between the parties to said action, as your petitioner is advised and verily believes.

Your petitioner is advised and charges the fact to be that there is **no adequate remedy available** to correct the wrong and injury sustained by the action of said Circuit Court of the United States, in taking and continuing to exercise jurisdiction over said cause, and that your petitioner will be otherwise remediless in the premises to obtain speedy and appropriate relief, save as herein prayed.

Wherefore, may it please your Honors to issue out of this Honorable Court a writ of mandamus to the said Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, commanding said Court to remand said cause

of Albert N. Moore, plaintiff, v. The Louisville & Nashville Railroad Company, defendant (No. 5406), to the State court whence it came, and that such further orders to that end may be made as may be conformable with justice and the practice of your Honorable Court in the premises.

And your petitioner will ever pray, etc.

ALBERT NEWTON MOORE,
by GEORGE SAFFORD,
his next friend and
THOMAS T. FAUNTLEROY,
SHEPARD BARCLAY,
Of Counsel for Petitioner.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1907

In the matter of
of
Albert N. Moore,
an infant, by next
friend, *Petitioner.*

State of Missouri, } ss:
City of St. Louis. }

GEORGE SAFFORD, of lawful age, being first duly sworn, says on his oath that he is the next friend and attorney of Albert N. Moore, an infant, the aforesaid petitioner, and on behalf of said petitioner, affiant makes this affidavit, deposes and says that he has read said petition for a writ of *mandamus* and knows the contents thereof; that the matters of fact therein stated are true; and that the matters therein stated upon information and belief, or as matters of opinion, he verily believes to be true; and further affiant sayeth not.

GEORGE SAFFORD.

Subscribed and sworn to before me, the undersigned, this 23rd day of January, 1908; my commission expires, February 20, 1911.

[OFFICIAL SEAL]

WILLIAM R. GILBERT,
Notary Public within and for the City of St. Louis, Missouri.

NOTICE OF APPLICATION FOR WRIT OF MANDAMUS

IN THE

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER
OF
ALBERT N. MOORE,
By George Safford, his Next Friend,
Petitioner.

To the Honorable, the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri:

This Honorable Court is hereby notified that the undersigned, as attorneys and counsel for the above named petitioner, Albert N. Moore, will, on Monday, January 27th, 1908, at noon of said date, or as soon thereafter as counsel can be heard in that behalf, apply to the Supreme Court of the United States by petition for a writ of mandamus to be directed to the Honorable, the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, to command your Honorable Court to remand an action at law, wherein the record is therein and wherein said petitioner, Albert N. Moore by next friend is plaintiff v. The Louisville & Nashville Railroad Company, defendant, No. 5406; and this notice is to inform your Honorable Court of said application.

THOS. T. FAUNTLEROY and
SHEPARD BARCLAY,
Attorneys and of Counsel for Petitioner, Albert N. Moore.

Eastern Division of the Eastern Judicial District of Missouri, ss:

ST. LOUIS, Mo., January 23, 1908.

The undersigned, as clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, hereby certifies that a paper, of which the foregoing is a copy was filed in said Court by the counsel aforesaid, this 23rd day of January, 1908.

In testimony whereof, witness my hand and the seal of said Court this 23rd day of January, 1908.

SEAL
Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District of Missouri.

JAMES R. GRAY,
Clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

TRANSCRIPT OF RECORD

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI.

BE IT REMEMBERED: that heretofore, to-wit: on the 31st day January, A. D. 1907, there was filed in the office of the Clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, a transcript of proceedings from the Circuit Court, City of St. Louis, wherein Albert Newton Moore, by his next friend, Geo. Safford, is plaintiff, and the Louisville & Nashville Railroad Company is defendant, which said transcript is in words and figures as follows, to-wit:

(TRANSCRIPT.)

State of Missouri, } ss.
City of St. Louis. }

Be it remembered, that heretofore, to-wit: at the October Term, A. D. 1906, of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the 16th day of November, 1906, the following proceeding was had in "The Matter of Albert Newton Moore, a minor", to-wit:

Friday, November 16th, 1906.

Albert Newton Moore,
vs. 539 Dec. T. 1906,
The Louisville & Nashville Railroad Company.

Now comes Albert Newton Moore, an infant over the age of fourteen years, and presents his petition for the

appointment of next friend, and George Safford having filed his written consent to act as such, it is ordered by the Court that he be appointed to act as next friend for said minor Albert Newton Moore.

The said petition and consent, is in words and figures as follows, to-wit:

State of Missouri, } ss.
City of St. Louis. }

In the Circuit Court in and for the City of St. Louis, Missouri, December Term, 1906.

Albert Newton Moore, Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

To the Honorable Judge of the Circuit Court of the City of St. Louis, Missouri.

The petition of Albert Newton Moore respectively represents:

That he is an infant over the age of fourteen years and under the age of twenty-one years; that he desires to institute a suit in the Circuit Court of the City of St. Louis, Missouri, against The Louisville & Nashville Railroad Company to recover the sum of twenty thousand dollars damages for personal injuries received by said Albert Newton Moore by reason of the negligence and carelessness of the said Louisville & Nashville Railroad Company in operating a certain locomotive and train of cars in the City of Mt. Vernon, Illinois, on the tenth day of November, 1905; that the said Albert Newton Moore has no legally appointed guardian and

that his father departed this life in August, 1905; that George Safford of St. Louis, has consented to act and does hereby consent to act as next friend to the said Albert Newton Moore in the prosecution of said suit and to pay the costs thereof.

Wherefore the said Albert Newton Moore prays that the said George Safford may be appointed as his next friend for the purpose of instituting said suit.

IN WITNESS WHEREOF we have hereunto set our hands at St. Louis, Missouri, this sixteenth day of November, 1906.

ALBERT NEWTON MOORE,
GEO. SAFFORD.

And afterwards, to-wit, on November 16th, 1906, a petition was filed in the office of the Clerk of said Court, in cause No. 43850, Series A, of the causes in said Court, wherein the said Albert Newton Moore, by next friend aforesaid, is plaintiff and the Louisville and Nashville Railroad Company is defendant.

The said petition is in words and figures as follows, to-wit:

State of Missouri, } ss.
City of St. Louis. }

In the Circuit Court in and for the City of St. Louis, Missouri, December Term, 1906.

Albert Newton Moore, by George Safford, Next Friend, Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

Comes now Albert Newton Moore, plaintiff, in the above entitled cause, by George Safford, next friend,

and for his cause of action states that the said George Safford, was on the sixteenth day of November, 1906, duly appointed by the Circuit Court in and for the City of St. Louis, Missouri, to act as next friend of plaintiff in the above entitled cause.

Plaintiff, by his next friend, further states that the defendant, The Louisville & Nashville Railroad Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Kentucky for the purpose of transporting passengers and freight for hire, from point to point in Kentucky, Illinois and Missouri and at all such times was duly authorized to do business as a foreign corporation in the States of Missouri and Illinois and at all such times owned, maintained and controlled an office for the transaction of its business in the City of St. Louis, Missouri.

Plaintiff, by his next friend, further states that on a certain day, to-wit, the tenth day of November, 1905, the defendant negligently and carelessly caused a steam locomotive then and there attached to and drawing a number of freight cars in a westwardly direction in Mt. Vernon, Illinois, to strike and injure plaintiff to his great damage.

Plaintiff, by his next friend, further states that when plaintiff was injured as aforesaid and at all times theretofore Mt. Vernon was a city duly incorporated under the laws of the State of Illinois and duly authorized by the laws of said State to control and regulate by ordinance the speed of locomotives and freight trains within the limits of said city and that when plaintiff was injured and at all times theretofore, the defendant negligently and carelessly caused the locomotive and train

of freight cars thereto attached by which plaintiff was injured as aforesaid, to run at a rate of speed in excess of the rate of six miles per hour and thereby violated the provisions of Ordinance No. 280 of said City of Mt. Vernon, by the provisions of which ordinance the defendant was required to run locomotives and freight trains at a rate of speed not exceeding six miles an hour in said City of Mt. Vernon at said time, and that the defendant when plaintiff was injured as aforesaid and at all times theretofore had received from the City of Mt. Vernon, a true copy of said ordinance and been served therewith by the duly authorized officers of said city and had accepted said ordinance and contracted and agreed with the plaintiff, the said City of Mt. Vernon and the State of Illinois to comply with the provisions thereof.

Plaintiff further states that at the point where plaintiff received the injuries aforesaid and at all points at and near the track on which said locomotive and cars were running when plaintiff was injured as aforesaid within six hundred feet of the place where plaintiff was so injured the employes of the defendant, the employes of a corporation then owning, controlling and operating shops for the manufacture of freight cars and the public generally when plaintiff was injured and at all times of the day and night then continually theretofore for a period of many years frequently habitually and with the knowledge, and acquiescence of the defendant, walked to and fro and that the defendant, when plaintiff was injured as aforesaid and at all times theretofore by the exercise of ordinary care would have known, and did know, that plaintiff, defendant's employes, the employes working in said car shops and the public gen-

erally were likely to be and were walking to and fro at all times of the day and night at or near the place where plaintiff received the injuries aforesaid.

Plaintiff further states that at the time he received the injuries herein set out and at all times prior thereto, the defendant negligently and carelessly caused and permitted said locomotive and freight cars to run at a rate of speed unsafe and dangerous to plaintiff and persons near plaintiff who were likely to be and who were moving toward, dangerously near, at and upon the track upon which said locomotive and cars were running as aforesaid and that the defendant at all such times, by its servants and agents then and theretofore in charge of and controlling the motion of said locomotive and cars, negligently and carelessly failed to keep a vigilant watch ahead of said locomotive for plaintiff and persons who were likely to be and persons who were moving toward, dangerously near, at and upon said track and upon the first appearance of danger negligently and carelessly failed to stop said locomotive and cars in the shortest time it could by the exercise of ordinary care and that at all such times the said defendant, negligently and carelessly failed to either ring the bell on said locomotive or blow the whistle on said locomotive or give any warning to any one and thereby negligently and carelessly failed to warn plaintiff of the approach of said locomotive and the consequent danger and that the defendant by the exercise of ordinary care would have known, and did know, in time to have prevented the plaintiff from receiving said injuries by the exercise of ordinary care, that plaintiff and other persons then and theretofore were likely to be and were moving toward, dangerously

near, at and upon said track, at and near the place where plaintiff was injured as aforesaid and in danger of being injured by said locomotive.

Plaintiff further states that although the defendant at all times prior to the day on which plaintiff was injured as aforesaid notified all persons within hearing distance of an electric bell then and theretofore maintained by by defendant on a stationary post near and within hearing distance of the point at which plaihtiff received said injuries by ringing said bell when cars and locomotives were moving within hearing distance thereof and by not ringing said bell when cars and locomotives were not moving within hearing distance thereof whether or not locomotives and cars were moving at or near the point where plaintiff was injured as aforesaid, which method of notification was always recognized and relied upon by the plaintiff, the defendant, its employes and the general public as a proper notification and assurance on the part of the defendant to all persons within hearing distance of said bell of the conditlon of said premises with reference to danger from moving cars, the defendant, as the locomotive by which plaintiff was injured as aforesaid approached and injured plaintiff and for some time prior thereto negligently and carelessly failed to ring said bell on said stationary post and warn the persons within hearing distance of said bell and especially the plaintiff that said locomotive was approaching and the consequent danger and thereby negligently and carelessly assured plaintiff that it was safe for him to approach and to walk near upon along and over said track at and near the point where he was injured as aforesaid.

Plaintiff, by his said next friend, further states that

by reason of the negligence and carelessness aforesaid, and as a direct result thereof the bones, muscles, tendons, ligaments, veins, arteries, nerves, membranes and tissues of plaintiff's head, right foot, right leg, right thigh, right hip, left arm, left shoulder, and back were greatly cut, lacerated, torn, bruised, crushed, twisted, strained, bent, broken and infected, plaintiff's memory, sense of sight, sense of hearing, mental power, muscular power and power and ability to earn an income and wages seriously and permanently impaired, plaintiff's right leg and thigh greatly and permanently shortened and plaintiff caused to suffer great bodily pain and mental anguish and be a hopeless cripple and incur liability for and expend a large sum of money for medical and surgical attention and services in trying to cure said injuries, to-wit: The sum of one hundred dollars and that plaintiff during his life will always remain a cripple as aforesaid and suffer great and permanent bodily pain and mental anguish and to be compelled to expend in and about the medical and surgical treatment of said injuries a large sum to plaintiff at present unknown.

Plaintiff by his next friend, further states that by reason of the facts aforesaid and as a direct result thereof he has been damaged, in the sum of twenty thousand dollars for which with the costs of this suit he prays judgment.

GEO. SAFFORD,
Next Friend and Attorney for Plaintiff.

Upon the filing of the said petition, a writ of summons for the defendant, was issued by the Clerk of said Court, to the Sheriff of the City of St. Louis; which said writ, together with the return of said sheriff

therein endorsed, are respectively in words and figures as follows, to-wit:

State of Missouri, } ss.
City of St. Louis. }

The State of Missouri: To the Sheriff of the City of St. Louis—Greeting:

We command you to summon The Louisville & Nashville Railroad Company, a corporation, to appear before the Judges of our said *Court* Court, on the first day of the next term thereof, to be held in the City of St. Louis, at the court house in said city, on the first Monday of December next, then and there to answer the complaint of Albert Newton Moore, by George Safford, next friend, as set forth in the annexed petition; and have you then and there this writ:

WITNESS, WILLIAM H. HAUSCHULTE, Clerk of our said Court, with the seal thereof hereto affixed, at office in the City of St. Louis, this 17th day
[SEAL] November, in the year of our Lord nineteen hundred and six.

WM. H. HAUSCHULTE, *Clerk.*

Served this writ in the City of St. Louis, Missouri, on the within named defendant the Louisville & Nashville Railroad Company (a corporation), this 17th day of November, 1906, by delivering a copy of the writ and petition as furnished by the clerk to John Fitzgerald, Supt. of the said defendant corporation, he being in said defendant's usual business office and in charge thereof. The president or other chief officer of said defendant could not be found in the City of St. Louis at the time of service.

PATRICK H. CLARKE, *Sheriff.*
By R. J. BURNS, *Deputy.*

Fee $1.00.

And at the December Term, 1906, of said court, and on the third day thereof, the following proceedings were had in said cause, to-wit:

Wednesday, December 5th, 1906.

Albert Newton Moore by George Safford, Next Friend,

vs. 43859

The Louisville and Nashville Railroad Company.

Now at this day comes the defendant by attorney, and files a petition, praying for the removal of this cause to the Circuit Court of the United States, and also files herein its bond conditioned according to law, in the sum of five hundred dollars. And the Court having heard and duly considered the said petition, doth approve said bond, and doth order that the clerk of this court forthwith certify to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri a transcript of the record and proceedings in this cause as fully as the same remain on file and of record in this court.

The said petition and bond for removal are, respectively, in words and figures as follows, to-wit:

State of Missouri, } ss.
City of St. Louis. }

In the Circuit Court in and for the City of St. Louis, Missouri. December Term, 1906.

Albert Newton Moore by George Safford, Next Friend, Plaintiff,

vs.

The Louisville and Nashville Railroad Company, a Corporation, Defendant.

PETITION FOR REMOVAL.

Your petitioner, the Louisville and Nashville Railroad Company, defendant in the above entitled cause, respectfully shows that the matter and amounts in dispute in this cause, exclusive of interest and costs, exceeds the sum of two thousand dollars.

Your petitioner further shows that this action is wholly between citizens of different States; that the plaintiff, Albert Newton Moore, is a citizen and resident of the State of Illinois, and was such at the time of the commencement of this action, and ever since, and is now, such citizen and resident of the State of Illinois; that George Safford, next friend of said Albert Newton Moore, is a citizen and resident of the State of Missouri, and was such at the time of the commencement of this action, and ever since has been, and is now, such citizen of the State of Missouri; that the Louisville and Nashville Railroad Company, the defendant and your petitioner herein, was, at the time of the institution of this suit, and has been ever since that time, and is now, a corporation organized, created and existing under the laws of the State of Kentucky, and is a citizen and resi-

dent of the State of Kentucky, and was such at the time of the institution of this suit, and has been ever since said time, and is now, such citizen and resident of the State of Kentucky; that the Louisville and Nashville Railroad Company, defendant herein, was not, at the time of the filing of this suit, or since said time, nor is it now, a citizen or resident of the State of Missouri, or of any other State than the State of Kentucky.

Your petitioner further shows that this action is of a civil nature at common law, and has been brought, and is now pending in this Honorable court, and has not yet been tried, nor has the time at or before which the defendant, your petitioner, is required by the law of the State of Missouri, or by any rule or rules of this Honorable Court, to answer or plead to the petition of the plaintiff, elapsed, and your petitioner has not yet filed any pleading or in any way appeared in this action.

The general object and nature of this suit is as follows, namely:

Plaintiff seeks to recover from defendant, your petitioner, damages in the sum of twenty thousand dollars, because of alleged wrongful acts of this defendant, its agents and servants, in negligently and carelessly causing, as is alleged in plaintiff's petition a steam locomotive attached to and drawing a number of cars in Mt. Vernon, Illinois, to strike and injure plaintiff, to his damage.

Your petitioner desires to remove this suit before trial thereof, to the next Circuit Court of the United States to be held in the Eastern Division of the Eastern District of Missouri, and your petitioner herewith offers good and sufficient surety and bond for your petitioner entering in said Circuit Court of the United States, on the

the first day of the next session thereof, a copy of the record in this suit, and for paying all costs that they may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully and improperly removed thereto.

Wherefore, your petitioner prays this Court that said surety and bond may be accepted, and that this Honorable Court will make an order removing this cause to the next Circuit Court of the United States to be held in the Eastern Division of the Eastern District of Missouri, pursuant to the statutes of the United States in such cases made and provided; and your petitioner further prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed to said Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri, and it will ever pray.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
By BRYAN & CHRISTIE,
Attorneys for Petitioner in the above entitled cause.

State of Missouri, } ss.
City of St. Louis. }

P. Taylor Bryan, being duly sworn on his oath, says he is one of the attorneys for the defendant in the above entitled cause, and of the petitioner named in the foregoing petition; that he has read the said petition and believes the same to be true, and that said petitioner is absent from, and is a non-resident of, the City of St. Louis, State of Missouri, in which said suit is brought, and that affiant makes this affidavit in behalf of said

defendant for the reason that said defendant, Louisville and Nashville Railroad Company, is absent from, and non-resident of, the State of Missouri.

P. TAYLOR BRYAN.

Subscribed and sworn to before me, a notary public within and for said City and State, duly qualified and commissioned for a term expiring on the 5th day of December, 1906.

My term expires February 14th, 1907.

[SEAL] HAROLD R. SMALL,
Notary Public, in and for the City of St. Louis, Mo.

State of Missouri, } ss.
City of St. Charles. }

In the Circuit Court in and for the City of St. Louis, Missouri, December Term, 1906.

Albert Newton Moore, by George Safford, Next Friend, Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

BOND FOR REMOVAL.

Know all men by these presents that we, the Louisville & Nashville Railroad Company, a corporation organized and existing under the laws of the State of Kentucky as principal, and the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, as surety, are held and firmly *bond* unto Albert Newton

Moore in the penal sum of five hundred dollars for the payment of which well and truly to be made unto the said Albert Newton Moore, his heirs, representatives and assigns, we bind ourselves, our representatives and successors, jointly and firmly by these presents.

Upon condition, nevertheless, that whereas the said Louisville & Nashville Railroad Company has filed its petition in the Circuit Court of the City of St. Louis, State of Missouri, for the removal of a certain cause therein pending, wherein said Albert Newton Moore is plaintiff, and the said Louisville & Nashville Railroad Company is defendant, to the Circuit Court of the United States in and for the Eastern Division of the Eastern District of Missouri.

Now, if the said Louisville and Nashville Railroad Company shall enter into the said Circuit Court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, we, the said Louisville & Nashville Railroad Company and the said United States Fidelity and Guaranty Company have hereunto caused our names to be signed, and this instrument to be sealed, this fifth day of December, 1906.

Louisville & Nashville Railroad Company, [seal]
By Bryan & Christie, [seal]
Its Attorneys in Fact and at Law.
United States Fidelity & Guaranty Company,
By Noel L. Robyn, [seal]
Attorney in Fact.

Approved in open court this
5th day of December, 1906.

WM. H. HAUSCHULTE,
Clerk.

State of Missouri, }
City of St. Louis. } ss.

I, Fred H. Kreismann, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, do hereby certify the above and foregoing to be a full, true and complete transcript of the record and proceedings in the above entitled cause, including the petition, affidavit and bond for removal and the order of removal, as fully as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at office in [SEAL] the City of St. Louis, this the 28th day of January, 1907.

FRED H. KREISMANN,
Clerk, Circuit Court.

And afterwards, to-wit, on the 22nd day of March, A. D. 1907, there was filed in said cause an amended petition, which said amended petition is in words and figures as follows, to-wit:

(AMENDED PETITION)

State of Missouri, } ss.
City of St. Louis. }

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

Albert Newton Moore,
by George Safford, Next Friend.
Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation,
Defendant.

Comes now Albert Newton Moore, plaintiff in the above entitled cause, by George Safford, next friend, and for his cause of action states that the said George Safford, was on the sixteenth day of November, 1906, duly appointed by the Circuit Court in and for the City of St. Louis, Missouri, to act as next friend of plaintiff in the above entitled cause.

Plaintiff, by his said next friend, further states that the defendant, The Louisville & Nashville Railroad Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Kentucky for the purpose of transporting passengers and freight, for hire, from point to point in Kentucky, Illinois and Missouri and at all such times was duly authorized to do business as a foreign corporation in the State of Missouri and Illinois and at all such times owned, maintained and controlled an office for the transaction of its business in the City of St. Louis, Missouri.

Plaintiff, by his next friend, further states that on a certain day, to-wit: the tenth day of November, 1905, the defendant negligently and carelessly caused a steam locomotive then and there attached to and drawing a number of freight cars in a westwardly direction in Mt. Vernon, Illinois, to strike and injure plaintiff to his great damage.

Plaintiff, by his next friend, further states that when plaintiff was injured as aforesaid and at all times theretofore Mt. Vernon was a city duly incorporated under the laws of the State of Illinois and duly authorized by the laws of said State to control and regulate by ordinance the speed of locomotives and freight trains within the limits of said city and that when plaintiff was injured and at all times theretofore the defendant negligently and carelessly caused the locomotive and train of freight cars thereto attached by which plaintiff was injured as aforesaid to run at a rate of speed in excess of the rate of six miles per hour and thereby violated the provisions of Ordinance #280 of said City of Mt. Vernon, by the provisions of which ordinance the defendant was required to run locomotives and freight trains at a rate of speed not exceeding six miles an hour in said city of Mt. Vernon at said time, and that the defendant when plaintiff was injured as aforesaid and at all times theretofore had received from the City of Mt. Vernon, a true copy of said ordinance and been served therewith by the duly authorized officers of said city and had accepted said ordinance and contracted and agreed with the plaintiff, the said City of Mt. Vernon and the State of Illinois to comply with the provisions thereof.

Plaintiff further states that at the point where plaintiff received the injuries aforesaid and at all points at

and near the track on which said locomotive and cars were running when plaintiff was injured as aforesaid within six hundred feet of the place where plaintiff was so injured the employes of the defendant, the employes of a corporation then owning, controlling and operating shops for the manufacture of freight cars and the public generally when plaintiff was injured, and at all times of the day and night then and continually theretofore for a period of many years frequently, habitually and with the knowledge and acquiescence of the defendant, walked to and fro, and that the defendant, when plaintiff was injured as aforesaid and at all times theretofore by the exercise of ordinary care would have known, and did know, that plaintiff, defendant's employes, the employes working in said car shops and the public generally, were likely to be and were walking to and fro at all times of the day and night at and near the place where plaintiff received the injuries aforesaid.

Plaintiff, by said next friend further states that at the time the plaintiff received the injuries herein set out the defendant, by its officers, by its General Superintendent and by the person who employed and discharged and has general supervision over the engineers employed by the defendant and especially over the engineer in charge of, operating and controlling the motion of the locomotive by which plaintiff was injured and who caused said locomotive to injure plaintiff as aforesaid knew at all times before plaintiff received the injuries herein set out that said engineer in charge of the locomotive that injured plaintiff as aforesaid continually and habitually operated said locomotive and other locomotives in the City of Mount Vernon at a rate of speed unsafe and dangerous to persons on and near the track

on which said locomotive was being operated and at a rate of speed in excess of the rate of six miles per hour and violation of the provisions of said ordinance.

Plaintiff by his next friend further states that the defendant before plaintiff received the injuries herein set out negligently and carelessly failed to notify the engineer who caused said locomotive to injure plaintiff as aforesaid of the provisions and requirements of said ordinance or of the provisions and requirements of said statute which said negligence on the part of the defendant contributed with the other negligence of defendant herein complained of to cause the injuries to plaintiff herein set out.

Plaintiff, by his next friend, further states that at the time plaintiff was injured as aforesaid and at all times prior thereto there was in force in the State of Illinois a statute duly enacted by the proper authorities in said State a true copy of said statute being as follows:

"93. SPEED THROUGH CITIES—DAMAGES—CUMU-
"LATIVE PENALTIES. Art. 24. Whenever any
"railroad corporation shall by itself or agents, run
"any train, locomotive engine, or car at a greater
"rate of speed in or through the incorporated
"limits of any city, town or village, than is per-
"mitted by any ordinance of such city, town or
"village, such corporation shall be liable to the
"person aggrieved for all damages done to the
"person or property by such train, locomotive
"engine or car; and the same shall be presumed
"to have been done by the negligence of said corpo-
"ration, or their agents; and in addition to such
"penalties as may be provided by such city, town
"or village, the person aggrieved by the violation
"of any of the provisions of this section, shall
"have an action against such corporation, so viola-
"lating any of the provisions to recover a penalty

"of not less than one hundred dollars nor more
"than two hundred dollars ($200) to be recovered
"in any court of competent jurisdiction; said action
"to be an action of debt, in the name of the people
"of the State of Illinois for the use of the person
"aggrieved; but the court or jury trying the case
"may reduce said penalty to any sum, not less
"however than fifty dollars ($50), where the
"offense committed by such violation may appear
"not to be malicious or willful; provided, that no
"such ordinance shall limit the rate of speed, in
"case of passenger trains to less than ten miles
"per hour, nor in any other case to less than six
"miles per hour."

Plaintiff further states that at the time he received the injuries herein set out and at all times prior thereto, the defendant negligently and carelessly caused and permitted said locomotive and freight cars to run at a rate of speed unsafe and dangerous to plaintiff and persons near plaintiff who were likely to be and who were moving toward, dangerously near, at and upon the track upon which said locomotive and cars were running as aforesaid and that the defendant at all such times, by its servants and agents then and theretofore in charge of and controlling the motion of said locomotive and cars, negligently and carelessly failed to keep a vigilant watch ahead of said locomotive for plaintiff and persons who were likely to be and persons who were moving toward, dangerously near, at and upon said track and upon the first appearance of danger negligently and carelessly failed to stop said locomotive and cars in the shortest time it could by the exercise of ordinary care and that at all such times the said defendant, negligently and careless[illegible] failed to either ring the bell on said locomotive or blow the whistle on said

locomotive or give any warning to any one and thereby negligently and carelessly failed to warn plaintiff of the approach of said locomotive and the consequent danger and that the defendant by the exercise of ordinary care would have known, and did know, in time to have prevented the plaintiff from receiving said injuries by the exercise of ordinary care, that plaintiff and other persons then and theretofore were likely to be and were moving toward, dangerously near, at and upon said track, at and near the place where plaintiff was injured as aforesaid and in danger of being injured by said locomotive.

Plaintiff further states that although the defendant at all times prior to the day on which plaintiff was injured as aforesaid notified all persons within hearing distance of an electric bell then and theretofore maintained by defendant on a stationary post near and within hearing distance of the point at which plaintiff received said injuries by ringing said bell when cars and locomotives were moving within hearing distance thereof and by not ringing said bell when cars and locomotives were not moving within hearing distance thereof whether or not locomotives and cars were moving at or near the point where plaintiff was injured as aforesaid, which method of notification was always recognized and relied upon by the plaintiff, the defendant, its employes and the general public as a proper notification and assurance on the part of the defendant to all persons within hearing distance of said bell of the condition of said premises with reference to danger from moving cars, the defendant, as the locomotive by which plaintiff was injured as aforesaid approached and injured plaintiff and for some time prior thereto

negligently and carelessly failed to ring said bell on said stationary post and warn the persons within hearing distance of said bell, and especially the plaintiff, that said locomotive was approaching and the consequent danger, and thereby negligently and carelessly assured plaintiff that it was safe for him to approach and to walk near upon along and over said track at and near the point where he was injured as aforesaid.

Plaintiff, by his said next friend, further states that by reason of the negligence and carelessness aforesaid and as a direct result thereof, the bones, muscles, tendons, ligaments, veins, arteries, nerves, membranes and tissues of plaintiff's head, right foot, right leg, right thigh, right hip, left arm, left shoulder and back were greatly cut, lacerated, torn, bruised, crushed, twisted, strained, bent, broken and infected, plaintiff's memory, sense of sight, sense of hearing, mental power, muscular power and power and ability to earn an income and wages seriously and permanently impaired, plaintiff's right leg and thigh greatly and permanently shortened and plaintiff caused to suffer great bodily pain and mental anguish and be a hopeless cripple and incur liability for and expend a large sum of money for medical and surgical attention and service in trying to cure said injuries, to-wit: the sum of one hundred dollars, and that plaintiff during his life will always remain a cripple as aforesaid, and suffer great and permanent bodily pain and mental anguish and to be compelled to expend in and about the medical and surgical treatment of said injuries a large sum, to plaintiff at present unknown.

Plaintiff, by his next friend, further states that by reason of the facts aforesaid, and as a direct result

thereof, he has been damaged, in the sum of twenty thousand dollars, for which, with the costs of this suit, he prays judgment.

GEO. SAFFORD,
Next Friend and Attorney for Plaintiff.

And afterwards, to-wit: on the 25th day of March, A. D. 1907, there was filed in said cause a stipulation allowing defendant to March 30th to plead, which is in words and figures as follows, to-wit:

(STIPULATION ALLOWING DEFENDANT TIME TO PLEAD)

State of Missouri, } ss.
City of St. Louis. }

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

Albert Newton Moore, by George Safford, Next Friend, Plaintiff,

vs.

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the defendant may plead to plaintiff's amended petition at any time on or before the thirtieth day of March, 1907.

GEO. SAFFORD,
Attorney for Plaintiff.

BRYAN & CHRISTIE,
Attorneys for Defendant.

And afterwards, to-wit: on the 30th day of March, A. D. 1907, there were filed in said cause motions to strike out amended petition and to make same more definite and certain, which are respectively in words and figures as follows, to-wit:

(MOTION TO STRIKE OUT AMENDED PETITION)

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

Albert Newton Moore, by George Safford, Next Friend,
Plaintiff,
vs.
Louisville & Nashville Railroad Company,
Defendant.

MOTION TO STRIKE OUT PLAINTIFF'S AMENDED PETITION

Now comes defendant Louisville and Nashville Railroad Company and moves the Court to strike out plaintiff's amended petition herein on the following grounds:

First. Because several causes or grounds of action are improperly united therein.

Second. Because common law and statutory causes of action are improperly united in a single count, which count constitutes said petition.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By BRYAN & CHRISTIE,
Attorneys.

(MOTION TO MAKE PETITION MORE DEFINITE AND CERTAIN)

In the United States Circuit Court in and for the Eastern Division of the Eastern Judicial District of Missouri, March Term, 1907.

Albert Newton Moore, by George Safford, Next Friend,
Plaintiff,
vs.
Louisville & Nashville Railroad Company,
Defendant.

MOTION TO MAKE MORE DEFINITE AND CERTAIN

Now comes the Louisville & Nashville Railroad Company and shows to the Court that the amended petition of the plaintiff is indefinite and uncertain in this, to-wit:

Said petition consists of one count and in said count attempts to unite several causes or grounds of action, some of which are common law and some statutory but has so intermingled the allegations appropriate to each of said causes of action as to make it indefinite and uncertain as to which causes of action allegations in said petition apply. By reason whereof the defendant is unable to make satisfactory answer to said petition.

WHEREFORE defendant moves the Court to rule plaintiff to make his amended petition more definite and certain in the respect above pointed out.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By BRYAN & CHRISTIE,
Attorneys.

And afterwards, to-wit, on the 20th day of May, A. D. 1907, there was filed in said cause a stipulation for continuance, which is in words and figures, as follows, to-wit:

(STIPULATION FOR CONTINUANCE)

In the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Albert Newton Moore by George Safford, Next Friend, Plaintiff,

vs

The Louisville & Nashville Railroad Company, a Corporation, Defendant.

(STIPULATION FOR CONTINUANCE)

It is hereby stipulated and agreed by and between the above named parties, that the above cause, set for trial, in the above named court, on May twentieth, 1907, be continued.

St. Louis, Mo., March 11, 1907.

GEO. SAFFORD,
Attorney for Plaintiff.
BRYAN & CHRISTIE and
H. R. SMALL,
Attorneys for Defendant.

And afterward, to-wit: on the 28th day of October, A. D. 1907, there was filed in said cause a stipulation for continuance, which is in words and figures as follows, to-wit:

(STIPULATION FOR CONTINUANCE)

Mr. Gray:

Will you please have #5406 Moore v. L. & N. Ry. Co. set for today, Oct. 8, 07, continued by consent.

BRYAN & CHRISTIE and
H. R. SMALL,
Attorneys for Defendant,
GEO. SAFFORD,
Attorney for Plaintiff.

And afterwards, to-wit: on the 26th day of October, A. D. 1907, there was filed in said cause a motion to remand, which said motion to remand is in words and figures as follows, to-wit:

(MOTION TO REMAND)

State of Missouri, } ss.
City of St. Louis. }

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, September Term, 1907.

Albert Newton Moore by George Safford, Next Friend, Plaintiff,

vs.

Louisville & Nashville Railroad Company, Defendant.

Comes now the plaintiff, Albert Newton Moore, by George Safford, next friend, and moves this Court to remand the above entitled cause to the Circuit Court in and for the City of St. Louis, Missouri, on the ground that this court is without jurisdiction to hear and determine the case.

GEORGE SAFFORD,
Attorney and Next Friend of Plaintiff.

And afterwards, to-wit: on the 2nd day of November, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

(MOTION TO REMAND SUBMITTED)

Albert N. Moore, by Next Friend, etc., Plaintiff.
5406 vs.
Louisville & Nashville Railroad Company, Defendant.

The motion to remand as heretofore filed by said plaintiff is this day submitted to the Court by counsel for the respective parties upon briefs to be furnished.

And afterwards, to-wit: on the 12th day of November, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

(MOTION TO REMAND OVERRULED)

Albert Newton, by Next Friend, etc. Plaintiff,
5406 vs.
Louisville & Nashville Railroad Company, Defendant.

The Court having fully considered the motion heretofore filed by said plaintiff to remand this cause doth order that said motion be and the same is hereby overruled. Memorandum of opinion filed.

And afterwards, to-wit: on the 19th day of November, A. D. 1907, there was filed in said cause a motion to reconsider ruling on motion to remand, which said motion is in words and figures as follows, to-wit:

(MOTION TO RECONSIDER RULING ON MOTION TO REMAND)

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, November, Term, 1907.

Albert Newton Moore by George Safford, Fext Friend, Plaintiff,

vs.

Louisville & Nashville Railroad Company, Defendant.

Comes now the plaintiff in the above named cause, Albert Newton Moore, by his next friend, George Safford, and asks the Court to reconsider its ruling on plaintiff's motion to remand for the reason that the Court erred in refusing to remand said cause from the Federal Court to the State Court, and in holding that the plaintiff had waived his objections to the jurisdiction of the Federal Court and had entered a general appearance in said Federal Court, since the plaintiff, being an infant, could not waive any question of jurisdiction either by himself or by his next friend, and plaintiff asks the Court to consider plaintiff's brief on the subject of waiver by an infant and his next friend herewith filed.

GEO. SAFFORD,
Attorney and Next Friend of Plaintiff.

And afterwards to-wit: on the 21st day of November, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

(Motion to Reconsider Ruling on Motion to Remand Overruled)

Albert N. Moore, by Next Friend, etc., Plaintiff,

5406 vs.

Louisville & Nashville Railroad Company, Defendant.

The Court having fully considered the motion of said plaintiff for a reconsideration of the ruling on the motion to remand herein, doth order that said motion to reconsider be and the same is hereby overruled.

And afterwards, to-wit, on the 27th day of November, A. D. 1907, the following among other proceedings were had and appear of record in said cause, to-wit:

(Term Bill of Exceptions Allowed and Filed.)

Albert Newton Moore, by Next Friend, Etc., Plaintiff,

5406 vs.

Louisville & Nashville Railroad Company, Defendant.

Now comes said plaintiff by his attorney and presents to the Court his term bill of exceptions in this cause, which is now signed by the Judge and is ordered filed and allowed of record herein.

Which said term bill of exceptions is in words and figures as follows, to-wit:

(TERM BILL OF EXCEPTIONS)

In the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Albert Newton Moore, by Next Friend, Plaintiff,
vs.
Louisville & Nashville Railroad Company, Defendant.
No. 5406 Term Bill of Exceptions.

Eastern Division of the Eastern Judicial District of Missouri, ss.

BE IT REMEMBERED that in the progress of this cause, the following proceedings were had at the September Term of said court, to-wit:

On the 26th day of October, 1907, plaintiff filed a motion to remand, as follows:

"State of Missouri, } ss.
City of St. Louis. }

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, September Term, 1907.

Albert Newton Moore by George Safford, Next Friend, Plaintiff,
vs.
Louisville & Nashville Railroad Company, Defendant.

Comes now the plaintiff, Albert Newton Moore, by George Safford, next friend, and moves this Court to remand the above entitled cause to the Circuit Court in

and for the City of St. Louis, Missouri, on the ground that this Court is without jurisdiction to hear and determine the case.

GEO. SAFFORD,
Attorney and Next Friend of Plaintiff."

Which motion, having been duly submitted and considered, was by the Court overruled on the 12th day of November, 1907, to which ruling and order plaintiff then and there duly excepted at the time; and thereafter on the 19th day of November, 1907, plaintiff filed a motion to reconsider said last mentioned ruling, which motion was as follows:

In the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.
November Term, 1907.

"Albert Newton Moore by George Safford, Next Friend,
Plaintiff,
vs.
Louisville & Nashville Railroad Company,
Defendant.

Comes now the plaintiff in the above named cause, Albert Newton Moore, by his next friend George Safford, and asks the Court to reconsider its ruling on plaintiff's motion to remand for the reason that the Court erred in refusing to remand said cause from the Federal Court to the State Court and in holding that the plaintiff had waived his objections to the jurisdiction of the Federal Court and had entered a general appearance in said Federal Court, since the plaintiff, being an infant, could not waive any question of jurisdiction either

by himself or by his next friend, and plaintiff asks the Court to consider plaintiff's brief on the subject of waiver by an infant and his next friend herewith filed.

GEO. SAFFORD,
Attorney and Next Friend of Plaintiff."

Which motion to reconsider, having been duly submitted, was by the Court overruled on the 21st day of November, A. D. 1907, to which ruling and order plaintiff, by his counsel, then and there duly excepted at the time; and now plaintiff presents this term bill of exceptions, and prays that the same may be allowed, signed, sealed and made part of the record in this cause which is done accordingly at the same term at which said proceedings took place, as witness the signature and seal of the undersigned as Judge of the United States Circuit Court aforesaid, at the City of St. Louis, Missouri, this 27th day of November, 1907, at the September Term, 1907 of said Court.

DAVID P. DYER, [SEAL]
Judge of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

O. K.
BRYAN & CHRISTIE,
Attorneys for Defendant.

(MEMORANDUM OF OPINION)

Albert N. Moore, by George Safford, Next Friend, etc.,
Plaintiff,
vs.
Louisville & Nashville Railroad Company,
Defendant.

DYER, J.

The plaintiff, Albert N. Moore, is a citizen and resident of the State of Illinois. George Safford, his next friend, is a citizen of St. Louis, Mo., and the defendant is a citizen of Kentucky. A suit to recover damages for personal injuries was brought by the plaintiff against the defendant in the Circuit Court of the City of St. Louis, to the December Term, 1906, of that Court. Upon the return day the defendant appeared and made application to have the cause removed to this court on the ground of diverse citizenship. The Court ordered the removal and the same was filed in this court on the 31st of January, 1907.

On the 22nd of March following the plaintiff by leave of this court filed an amended petition; on the 25th of March a stipulation was made between the parties allowing the defendant until the 30th of March to plead. On the 30th of March motion to strike out amended petition and motion to make same more definite and certain was filed. On May 22nd and on Oct. 8th, stipulations were filed continuing the case; on the 26th of October last the plaintiff filed a motion to remand the case to the State Court. The motion is as follows:

"Comes now the plaintiff, Albert Newton Moore, by George Safford, next friend, and moves this Court to

remand the above entitled cause to the Circuit Court in and for the City of St. Louis, Missouri, on the ground that this Court is without jurisdiction to hear and determine the case".

This motion has been presented very fully on brief.

If the *defendant* had made this motion when the case was first brought, the motion would have been sustained, on the ground that a citizen of Illinois could not sue a citizen of Kentucky in this jurisdiction. But in view of the appearance of the parties in this court (especially by the appearance of the plaintiff), the question of jurisdiction has been waived.

The defendant could have raised the question of jurisdiction in the State Court had it seen proper to do so, but not having raised the question, but on the contrary removed the case, it waived its right to be sued in the district of its residence. Waiving this right it had the right remaining to have the case removed to this court. That having been done the court acquired jurisdiction of the case.

The motion to remand will be denied, and it is so ordered.

United States of America
Eastern Division of the Eastern } ss.
Judicial District of Missouri.

In the Circuit Court of the United States in and for the division and district aforesaid.

I, James R. Gray, Clerk of the Circuit Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings in the

cause therein entitled, together with all things of and concerning the same, as fully as the same remains on file and of record in said cause in my office.

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of said Circuit Court at office in the City of St. Louis in said Division of said District, this 29th day of November, A. D. 1907.

[SEAL]

JAMES R. GRAY,
Clerk of said Court.

Office Supreme Court, U
FILED.
FEB 10 1908
JAMES H. McKENNE

17 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1907; NUMBER

IN THE MATTER
of
ALBERT N. MOORE, an Infant,
by next friend, Petitioner.

BRIEF TO SUPPORT PETITION FOR WRIT OF MANDAMUS

THOMAS T. FAUNTLEROY
SHEPARD BARCLAY
Attorneys and of Counsel for Petitioner

(No.)

ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1907

IN THE MATTER
of
ALBERT N. MOORE, an Infant,
by next friend, Petitioner.

BRIEF TO SUPPORT PETITION FOR WRIT OF MANDAMUS

The application for a *mandamus* to the Circuit Court of the United States to require the latter to remand the action whose record is in that court at present, is based on a total want of jurisdiction in that court to hear and determine that cause.

The plaintiff is an infant and a resident and citizen of Illinois, while the defendant corporation is a resident and citizen of Kentucky. No federal question or cause of action arising under the Constitution or laws of the

United States is involved. We respectfully ask this Honorable Court to issue its writ of *mandamus* to the Circuit Court, as indicated in the Petition, on the facts which are recited therein. We shall submit only a few words of argument, believing that the want of jurisdiction in the trial court is quite manifest in view of a late decision of this Honorable Court to be mentioned later. Our contention is that the cause, while it might properly be brought in the State courts of Missouri, has no lawful place in the federal jurisdiction and should be remanded hence.

I.

The Federal jurisdiction does not reach this cause or properly retain it, in the Circuit Court.

We are aware that it is permissible to invoke the use of the extraordinary writ of *mandamus* to require remand, only upon occasions where the court to which the writ is sought to be directed is **wholly without jurisdiction** to proceed, in the circumstances exhibited. We claim this to be the case, as demonstrated by the record of proceedings submitted here.

The preliminary test to apply is to ascertain whether the cause is one to which the federal jurisdiction extends under the Constitution and laws of the United States by reason of the citizenship of the parties, where (as here) no federal question arises from the facts alleged. That test is usually answered by observing whether the federal jurisdiction would attach, had the action been brought, in the first instance, in the United States Circuit Court in possession of the record.

We claim, most respectfully, that the case in view at this time falls within the ban of the prohibition or ex-

clusion of jurisdiction of federal courts to be found in the language of the federal law governing this subject, as follows:

> "but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought **only in the district of the residence of either the plaintiff or the defendant;**"
>
> 25 Stat. L., c. 366, p. 434
>
> 4 Fed. Stats. Annot. p. 366

The language we have just quoted has much more force than is usually ascribed to it.

Federal jurisdiction in the trial courts depends entirely upon statutory declarations thereof. By that we mean that the statute law of the United States must needs confer jurisdiction in order to permit its exercise. In the language above quoted, however, not only is no jurisdiction conferred, but it is, singularly enough, **expressly forbidden** and excluded. The language is that of the legislative voice of the United States, and to the legislature was confided the power to confer and define the limits of jurisdiction of the federal trial courts. The **expression** of certain facts (as to citizenship) conferring jurisdiction imports the **exclusion** of jurisdiction when those facts do not exist.

The construction of the federal law on this point which we urge, has been so recently the subject of careful attention by your Honors that any elaborate discussion (at least at this stage of the proceedings) seems needless. We consider the case now presented to fall distinctly within your Honors' rulings in

Ex parte Wisner, 203 U. S. 449

This decision is also authority for the correctness of the remedy here sought.

The petition for removal in the case now before us discloses on its face that no federal jurisdiction existed, and it could not thereafter be acquired by consent of an infant. And when jurisdiction in its essential features is wanting, it cannot be acquired in some cases by any consent.

Cochran v. County, 199 U. S. 260
Shaw v. Mining Co., 145 U. S. 444

The principles shown in these cases forbid the enlargement of judicial power in the case at bar by any action on the part of the infant plaintiff.

It was said for the Court by the learned CHIEF JUSTICE in one case:

> "We must hold, therefore, as has indeed already been ruled, Tennessee v. Union & Planters' Bank, 152 U. S. 454, 461, that the jurisdiction of the Circuit Courts on removal by the defendant, under this section, is limited to such suits as might have bren brought in that court by the plaintiff under the first section. The question is **a question of jurisdiction as such and cannot be waived.**"
>
> Railroad v. Davidson, 157 U. S. 208

But in view of the late full discussion in the *Wisner* case, it would seem to be unnecessary to argue further this phase of the case.

II.

The plaintiff, being an infant, could not effectively consent to submit himself to a jurisdiction which would not otherwise exist.

An important query which may be suggested, upon the facts which your Honors will have before you, is

whether or not plaintiff (if of full age and hence capable of consenting) might not submit himself to the federal jurisdiction in a different district by appearing therein.

The law is settled, both in the Federal and State jurisdictions, that where consent is necessary to confer jurisdiction, that **consent must be given by a person capable of such an act,** within the contemplation of law. Infants (for whom as a class all courts have a tender and protective regard) have been universally held **incapable of submitting to the jurisdiction of a court** where the only foundation of jurisdiction was such consent. Decisions can be multiplied in great number to sustain this proposition. We shall cite but a few at this time, however, as we understand the practice to be that an alternative writ will issue upon a *prima facie* showing, leaving to a later period the more thorough and elaborate presentation of the authorities supporting the contentions of the petitioner.

It was forcibly said in a well considered federal case, that "in the event of bringing an original suit against the minor in this Court, **he could only be brought in as a defendant by service of process upon him** in the manner pointed out by law, and that **any waiver** of service of process and entry of his appearance in this Court by attorney or by guardian *ad litem* would be **void and totally inoperative**".

Kingsbury v. Kingsbury, 3 Biss. 60

The annotated report of the above case in 14 Fed. Cas. p. 585 (No. 7817) should also be consulted, as the note thereto contains citations of a large number of decisions to which we refer without repeating them here.

The precept of law is quite universally recognized

that **infants have no power to take any steps in Courts of Justice** which require for validity the independent action of a competent individual. This precept finds illustration in the rule of law which makes contracts of infants voidable unless for necessaries; the exception itself resting upon, and being supported only by, the necessity which the word implies.

In matters of procedure it is held, quite generally, that, in the progress of a cause, important steps which depend upon consent cannot be taken upon such consent of a next friend or guardian *ad litem*, so as to charge an infant as if it was his personal act.

The principle which applies is that their consent is worthless in those matters whose validity depends entirely upon their consent.

Thus it was held that the consent of the guardian *ad litem* to the reference of a cause (on behalf of the infant whom he represented) was **absolutely void** and conferred no authority upon the Referee.

Gamache v. Prevost, 71 Mo. 84

An infant can not consent to submit to jurisdiction, appearing by attorney.

Bailey v. McGinniss, 57 Mo. 362
Copeland v. Yoakum, 38 Mo. 349

An appearance of an infant by his guardian, where the infant **had not been served with process,** is void, and so is a judgment based thereon.

Gibson v. Chouteau, 39 Mo. 565
Nagel v. Schilling, 14 Mo. Ap. 576

In an action at law, the next friend is really not a party; he is not even liable for costs.

Crandall v. Slaid, 11 Metc. 288
Brown v. Hull, 16 Vt. 673
Sinclair v. Sinclair, 13 M. & W. 640

It was held in an opinion of this Court (without dissent) that, "it is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant".

Kingsbury v. Buckner, 134 U. S. 680

Your Honors will also find a careful opinion, involving this subject, wherein that well remembered jurist, Chancellor WALWORTH, determined that a jurisdictional defense would be interposed by the Court for an infant, although it had not even been suggested by the guardian *ad litem*.

Bowers v. Smith, 10 Paige 204

But we forbear any great length of citations on this line as we regard the principles we invoke to be entirely familiar to your Honors.

CONCLUSION

The principles governing this cause seem to us elemental, though all rulings on jurisdictional questions in this High Court are serious, and call for most careful consideration, because, usually, of their extensive application in practice throughout the United States. We could have massed a great array of decisions to prove that an infant cannot properly give consent to

the assumption of jurisdiction over his person or property which jurisdiction could not otherwise lawfully be exercised, but we believe that rule to be so well grounded that elaborate discussion thereof is unnecessary here.

We submit the petition to your Honors, believing that the writ should issue as prayed.

THOMAS T. FAUNTLEROY,
SHEPARD BARCLAY,
Attorneys and of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907

IN THE MATTER
OF
ALBERT N. MOORE, AN INFANT,
BY NEXT FRIEND,
Petitioner

MOTION FOR PEREMPTORY MANDAMUS.

Now comes petitioner herein and moves this Honorable Court to make the order for a *mandamus* peremptory as prayed in the petition herein, and to make such further orders as the court may deem appropriate to require a remand of the cause of Albert N. Moore, an infant, *plaintiff*, vs. Louisville & Nashville Railroad Company, *defendant*, to the Circuit Court, City of St. Louis, Missouri, for the reasons following:

1. Because the state Circuit Court, City of St. Louis, Missouri, **has never lost jurisdiction** over said action as pending therein; said cause not having been duly removed into the federal jurisdiction, as appears from the record of proceedings in said state Circuit Court;

2. The Circuit Court of the United States in and for the Eastern Division of the Eastern

Judicial District of Missouri has **no jurisdiction over said cause,** in manner and form as the same was pending in said state Circuit Court;

3. The return to the alternative order in mandamus herein does not state facts sufficient to constitute any defense or reason why said alternative order should not be made peremptory.

4. Because the return is **insufficient in law** and states no sufficient ground why the alternative order should not be made absolute.

GEORGE SAFFORD,
As Next Friend,

THOMAS T. FAUNTLEROY,
SHEPARD BARCLAY,
Attorneys and of Counsel for Petitioner.

ST. LOUIS, MO., MARCH 5, 1908.

Service of copy of above motion for peremptory *mandamus* acknowledged in the matter of Albert N. Moore, petitioner.

P. TAYLOR BRYAN,
HARVEY L. CHRISTIE,
HAROLD R. SMALL,
Of Counsel for Respondent.

BRIEF FOR PETITIONER ON MOTION FOR PEREMPTORY MANDAMUS.

In this cause original in this Court leave was granted to file a petition for *mandamus*, upon which a rule to show cause was entered, returnable in due course.

Petitioner moves (upon the return) for a peremptory mandamus, on the ground that, upon the admitted facts, the state court has never lost jurisdiction over the action as pending there, and the Federal Circuit Court has no jurisdiction thereof, save to enter an order to remand.

The facts are within a narrow field.

The record here shows that plaintiff, when the action began, was an **infant** under twenty-one and over fourteen years of age, having no guardian, and that defendant was then a railroad corporation of KENTUCKY (Printed Record, pp. A1, A4). **A next friend** was appointed for plaintiff by the Circuit Court in the City of St. Louis on the petition of plaintiff, under the laws of Missouri (Printed Transcript, A2).

The local statutes (so far as material) providing for such appointments for infant plaintiffs are as follows:

Missouri law concerning next friends.

"Sec. 550. SUITS BY INFANTS, PROSECUTED BY WHOM.—Suits by infants may be commenced and prosecuted, either: First, by the guardian or curator of such infant; or, second, **by a next friend** appointed for him in such suit. (R. S. 1889, Sec. 1997)."

"Sec. 551. NEXT FRIEND, BY WHOM APPOINTED.—The appointment of a next friend for an infant **shall be made by the court in which the suit is intended to be brought,** or by a judge or clerk thereof. (R. S. 1889, Sec. 1998)."

"Sec. 552. HOW APPOINTED.—Such appointment shall be made on the petition in writing

of such infant, if of the age of fourteen years, and the written consent of the person proposed to be next friend to such infant acknowledged before, or proved to the court or officer making the appointment. (R. S. 1889, Sec. 1999)."

"Sec. 554. NEXT FRIEND TO GIVE BOND. —Before any person shall be appointed next friend for an infant in any suit to recover any personal property, debt or damages, he shall, if required by the court or officer to whom application for such appointment shall be made, execute a bond to such infant in double the amount claimed in such suit, with such securities as shall be approved by the court or officer, conditioned that such next friend shall account to such infant for all money or property which may be recovered in such suit. (R. S. 1889, Sec. 2001)."

* * * * * * * * * * *

"Sec. 556. PETITION AND APPOINTMENT TO BE FILED BEFORE FURTHER PROCEEDINGS.—The petition for the appointment of a next friend, the written consent of the person proposed to be next friend, and the order of appointment shall be filed in the office of the clerk of the court where the suit is proposed to be brought, before any proceedings shall be had in the cause. (R. S. 1889, Sec. 2003)."

"Sec. 557. GUARDIAN AND NEXT FRIEND LIABLE FOR COSTS.—The guardian or next friend of any infant who commences or prosecutes a suit shall be responsible for the costs thereof, unless such infant be permitted by the court to sue as a poor person, as provided by law. (R. S. 1889, Sec. 2004)."

R. S. Mo. 1899, Secs 550-557.

Where there is a general guardian or curator, appointed by the Probate Court, it is his duty to represent his ward in all legal proceedings, and to prosecute and defend for the ward without further admittance, in

the several courts of the state. (R. S. Mo. 1899, Sec. 3497.)

Under these state laws, the next friend for plaintiff was appointed **"by the court in which the suit"** was **"intended to be brought"** (to quote the above statute) and plaintiff by his next friend began a suit in that court against defendant for $20,000 damages for personal injuries sustained in Illinois, by reason of alleged negligence of defendant. The latter, in time, was served with process in Missouri, as a foreign corporation, so that the circuit court of that state **acquired full jurisdiction** over the cause and over the defendant personally.

At the return term of the summons, defendant filed a

Petition for Removal

to the United States Circuit Court (Printed Record, p. A11) solely on the supposed ground of diverse citizenship of the parties; yet the petition of defendant affirmatively alleges that PLAINTIFF is a citizen and resident of ILLINOIS, the next friend, "a citizen and resident of the State of Missouri" (*nothing said* in regard to *district* of his residence), and that DEFENDANT is a citizen and resident of KENTUCKY.

The defendant's own petition for removal discloses, on its face, that there was no ground for removal under the constitution and laws of the United States, and the jurisdiction of the state court was, therefore, not divested by the futile effort to effect a removal.

Nevertheless, the state court made an order approving the bond (submitted by defendant at the time) and directed the clerk to certify a transcript of the record to the Circuit Court of the United States, as prayed; which was accordingly done.

In the Federal Court

no appointment of a next friend for plaintiff was made, but an amended petition was filed, and by stipulations the defendant's time to plead was enlarged, and the cause was continued.

A Motion to Remand

to the state court was then filed for plaintiff, and overruled by the court (Printed Record, p. A28), after which a motion to re-consider that order met a like fate, and after duly saving exceptions (in the usual way) the pending application for mandamus was presented to this Court.

There is no claim (and could be none successfully maintained) of **any federal question** arising on the pleadings in the main case.

I.

The petition for removal discloses **by affirmative facts** that the case was NOT REMOVABLE, and hence the JURISDICTION of the state court **was not divested,** but CONTINUES.

The federal law ordains that where the foundation of jurisdiction in the federal court rests upon diverse citizenship "suit shall be brought ONLY in the district of the **residence of either the plaintiff or the defendant."**

25 Stat. L. c. 366, p. 434;
4 Fed. Stats. Annot., p. 366.

This is a PROHIBITION as well as an authority. It excludes (by use of the word "*only*") federal jurisdiction in cases where suit is brought **otherwise** than as authorized, in the district of residence of either plaintiff *or* defendant.

When the removal petition was filed in the state court,

this cause was not removable on the facts therein alleged. Those facts made a clear showing that the cause was not subject to be removed. Hence the jurisdiction of the state court was not divested. It continues, despite the filing of the insufficient and totally deficient petition for removal.

To cite the lucid exposition of this topic by the honored senior member in service in this Honorable Court:

> "A case is not, in law, removed from the state court, upon the ground that it involves a controversy between citizens of different states, unless, at the time the application for removal is made, the record, upon its face, shows it to be one that is removable. We say, upon its face, because 'the state court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further;' and 'all issues of fact made upon the petition for removal must be tried in the Circuit Court.' *Stone vs. South Carolina*, 117 U. S. 430, 432; Carson vs. Hyatt, 118 U. S. 279, 287. If the case be not removed **the jurisdiction of the state court remains unaffected,** and, under the act of Congress the jurisdiction of the federal court **could not attach until it becomes the duty of the state court to proceed no further.** No such duty arises unless a case is made by the record that entitles the party to a removal."
>
> Crehore vs. Ohio, etc. Ry., 131 U. S. 244.

No amount of action in the federal court, after an ineffective effort to transplant the cause there, will destroy the jurisdiction continuing over the cause in the state court. That jurisdiction cannot be obliterated by anything afterwards occuring in the federal court.

In an earlier case it was said:

> "The order to remand can be made at any time during the pendency of the cause when it shall appear there is no jurisdiction. The fact that Ebenezer R. Ayres had filed his answer in the United States Court is a matter of no importance. That fact did not of itself confer jurisdiction if there had been none before. It will be for the State Court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken **during the pendency of the suit in the other jurisdiction.**"
>
> Ayres vs. Wiswall, 112 U. S. 190 (191).

Much later, the learned CHIEF JUSTICE has held, on this point:

> "The cause was not properly removed, and **the state court has never lost jurisdiction.** *Stevens* vs. *Nichols*, 130 U. S., 230; Crehore vs. Ohio & Mississippi Railway Co., 131 U. S., 240, and cases cited."
>
> Young vs. Parker, 132 U. S. 267 (271).

The contention advanced by respondent in the case at bar, suggesting that some moves in the federal court have "**waived**" the right to remand and thereby, we are told, conferred jurisdiction, not otherwise or previously existing, is met by the facts and unanimous rulings thereon by this High Court in several cases, of which we will examine a few clear types. In some of the following decisions it will be found that the disclosed facts of citizenship would have **sustained the jurisdiction** if the suits had been **first filed in the federal court,** and no objection to jurisdiction had been entered, but because the removal petitions were defective, in their allegations of citizenship, **when the suit was begun,** the causes were ordered remanded, **after trial on the merits;** in one instance, although it does not appear that the question of jurisdiction was raised in

the court below by any plea or motion (158 U. S. 57) and, in another, **"no question was made in the court below"** (130 U. S. 231), in regard to the right to remove into the federal court.

La Confiance Comp'ie vs. Hall, 137 U. S. 61;
Stevens vs. Nichols, 130 U. S. 230;
Kellam vs. Keith, 144 U. S. 568;
Graves vs. Corbin, 132 U. S. 571;
Jackson vs. Allen, 132 U. S. 34;
Mattingly vs. R. R., 158 U. S. 53.

WAIVER THEORY.

We regard the foregoing decisions as a complete and emphatic answer to the theory advanced in this cause (in the federal trial court) to the effect that by the proceedings in that court *"the question of jurisdiction has been waived"* (quoting the memorandum opinion of the learned district Judge, respondent. Printed Record, p. A36). The *"waiver theory"* is rested on the contention that, as a party may waive his right to be sued in the district of his residence his appearance in the cause, although improperly removed, gives jurisdiction to the federal court to proceed, thereby sending the case on its new federal road rejoicing, while, at the same time, the case may, we suppose, concurrently proceed along the old path of jurisdiction in the state court where the defective removal petition has left it, under your Honors' repeated rulings. These beautiful consequences and a dual progress of the cause in TWO JURISDICTIONS would follow the sanction of the *"waiver theory,"* as developed by the case at bar. See comment thereon

Endy vs. Ins. Co., 24 Fed. 657.

The jurisdiction of the federal court in removed causes is *derivative*, not original; and jurisdiction over removed causes, or others where jurisdiction is derivative, cannot be acquired as if they had been first brought in the federal jurisdiction.

This is a general rule of procedure as well as of substantive jurisprudence, and it is exemplified by many decisions (of which we cite a few only) declaring that jurisdiction over a particular cause must be acquired as the law directs, and not otherwise; so that although an action may be within the original jurisdiction of a court, yet if the cause is brought within its purview by invoking its derivative or appellate jurisdiction, in some unauthorized manner, the original jurisdiction cannot avert the consequences of such deficiency of procedure, nor can consent in such case confer jurisdiction over the cause.

State vs. Potter, 16 Kansas, 80;
Robinson vs. Walker, 45 Mo., 120.

As was said in another Missouri case:

> "Unless the appeal had the effect to remove the cause to the circuit court, that court acquired no jurisdiction to try the same anew, even though the parties appeared and participated in the trial had. The judgment of the justice would be final and conclusive."

Moulder vs. Anderson, 63 Mo. Ap., 39.

A lucid illustrative case on this point is found in New York where the court, in reviewing the record of a cause which had reached the old Common Pleas Court improperly by appeal from a justice of the peace, was confronted by the argument that as the case was one over which the Common Pleas had original jurisdiction, the defective appellate steps were immaterial. The court (per SUTHERLAND, J.) said (following earlier decisions cited):

"The parties are considered as having a standing in court only by force of the appeal; and, although the subject matter of the suit be one over which the court might have had original jurisdiction, yet having been brought there by appeal, the subsequent acts of the parties are considered as compulsory, and not as intended voluntarily to confer jurisdiction upon the court. The act creates a new mode of transferring suits originally commenced before justices of the peace to the court of common pleas. It confers a new and peculiar jurisdiction upon those courts, which vests only upon a strict compliance by the parties with all the requirements of the act."

Latham vs. Edgerton, 9 Cow. 229.

This reasoning is peculiarly applicable to the federal jurisdiction and to the modes of bringing causes within it. The removal of a cause into the federal court cannot be accomplished by mere consent of parties or by their "*waiver*" of the question of jurisdiction over the cause, after removal. To permit such results would afford easy methods of conferring federal jurisdiction by collusion, as pointed out by Mr. JUSTICE MILLER, in touching on this subject:

"This court has uniformly acted upon the principle that in order to protect itself from collusive agreements between parties who wish to litigate their controversies in the federal courts, it would, on its own motion, take the objection of the want of jurisdiction in the circuit court, **especially as regards citizenship.** Hilton vs. Dickinson, 108 U. S. 165; Morgan's Executor vs. Gay, 19 Wall. 81."

Cameron vs. Hodges, 127 U. S. 325.

Every form of collusive jurisdiction or that acquired

by mere consent is beyond the pale of federal cognizance.

Turnbull vs. Ross, 141 Fed. 649.

In a well considered recent opinion by Judge LACOMBE it is held that where a federal court is without jurisdiction on removal "it is not conferred by the acts of the plaintiff in **participating in the steps taken in the suit after removal.**"

Crane Co. vs. Guanica Centrale, 132 Fed. 713.

To the same effect are:

Cella vs. Brown, 144 Fed. 742;
Mitchell Co. vs. Worthington, 140 Fed. 947.

Moreover, the *"waiver theory"* must depend solely upon the application of original jurisdiction in the federal circuit court to proceedings instituted therein by **removal process.** And if the original jurisdiction of the court is to be invoked to sustain such proceedings, the pleadings in the federal court must affirmatively show the requisite diverse citizenship, without resorting to facts alleged in the removal petition. In the case at bar neither the **amended petition** (Record, p. A17) nor any other paper avers diverse citizenship of the parties, save the removal petition, and the latter discloses on its face, that the cause **was not removable,** and that the jurisdiction of the state court over the cause was therefore not impaired, affected or divested. It is very trite law that federal jurisdiction, when founded on diverse citizenship, must **affirmatively appear** in the record. So that if "the question of jurisdiction has been waived," so that a motion to remand is no longer in order, **the pleadings in the federal court** should, at least, show the **facts of existing diverse citizenship** to which the federal

jurisdiction might attach (without reference to the abortive removal petition) which in this case those pleadings fail to do. And if such a *"waiver"* theory is set up, the averments of **diverse citizenship,** essential to connect the case with the **original** jurisdiction of the federal court, must then refer to **that very time** when such jurisdiction is invoked. This is a rule of pleading illustrated by many decisions, demonstrating that such allegations must directly aver the very time when the jurisdiction attaches; otherwise no federal jurisdiction exists.

Stevens vs. Nichols, 130 U. S. 230;
Mattingly vs. Railroad, 158 U. S. 53;
Graves vs. Corbin, 132 U. S. 585;
Merchants Co. vs. Ins. Co., 151 U. S. 384;
Railway vs. Twitchell, 59 Fed. 727;
Crasswell vs. Belanger, 56 Fed. 529;
MacNaughton vs. Railway, 19 Fed. 881.

So no supposed claim can be maintained in invoking original federal jurisdiction on the record of the cause made since the transcript of the state court proceedings was filed in the federal court. If such a claim of **"waiver,"** in the case now under review, has any substance, it was equally applicable in many of the cases wherein your Honors held that no federal jurisdiction attached, for want of proper facts alleged in the removal petition, despite the fact that the cases (after removal) had been **tried on their merits** in the federal court (involving all sorts of appearances meanwhile by all parties) and had come regularly into this high court for review, without objection on such ground.

If your Honors will examine the facts in the *Mattingly* case, you will see that Mr. Mattingly was a citizen and resident of WEST VIRGINIA, and the Baltimore & Ohio Railroad Company, a MARYLAND corporation. The suit

might **properly have been maintained if originally begun in the federal court,** and no objection for want of jurisdiction had been made. Defendant had filed its answer. In the federal court the cause was **"heard and decree rendered"** (p. 56) yet this court reversed the decree and remanded the cause with a direction to remand to the state court, because the removal petition alleged that plaintiff *"is"* a citizen of West Virginia and did not allege that he *was* such a citizen **"at the time of the commencement of the action."**

Notwithstanding the appearance of the parties below, as necessary to a hearing and final decree, the federal jurisdiction was denied by this Honorable Court in an opinion by His Honor, the CHIEF JUSTICE, without dissent.

Mattingly vs. Railroad, 158 U. S. 53.

In that case the learned opinion says:

> "Although it does not appear that the question of jurisdiction was raised in the court below by any plea or motion, yet as the record **failed to affirmatively show jurisdiction,** this court must take notice of the defect."

In the earlier unanimous decision by Mr. JUSTICE HARLAN (later mentioned by Mr. JUSTICE BREWER in the report on a second writ of error in the same action, Stevens' Admr. vs. Nichols, 157 U. S. 370), the record disclosed that Mr. Nichols *"is"* a citizen of Missouri, and defendants *"are"* citizens of New York, which would have furnished sufficient basis to sustain **original jurisdiction** of the federal court in Missouri by consent of parties; yet because the removal petition did not aver diverse citizenship **"at the time of the commencement of the action,"** this court held that the federal circuit court acquired *no jurisdiction*, although "in the latter court,

the necessary pleadings having been filed, the case **was tried"** (to quote the official report, p. 231)

Stevens vs. Nichols, 130 U. S. 230.

In that case the report states:

> "No question was made in the court below or in this court as to the right of Stevens & Mirick to remove the case from the state court" (p. 231).

But the reversal of the judgment for want of jurisdiction, **after trial,** in a case which **might fall within the original jurisdiction of the federal trial court,** on the facts recited in the removal petition, indicates the utter untenability of the *"waiver"* theory advanced in the case at bar to maintain federal jurisdiction founded on supposed diverse citizenship.

In the *Crehore* case (an action for personal injuries) decided in an opinion by Mr. JUSTICE HARLAN, there had been a **trial on the merits** in the federal court, after removal from the state court; yet the federal jurisdiction was denied and the cause ordered remanded to the state court because the removal petition was defective in failing to aver diverse citizenship **"at the commencement of the action** in the state court." This court also refused to grant leave to amend the removal petition, despite the earnest argument therefor by Hon. LAWRENCE MAXWELL, JR., one of the ablest members of the bar of this court.

Crehore vs. Railway, 131 U. S. 240.

In the *Kellam* case the petition for removal averred diverse citizenship, *in the present tense*, but was silent thereto in regard to the time *when the suit in the state court was* BEGUN. In the federal court the pleadings were *"recast"* (p. 569) and in the amended bill in equity, which

was filed by plaintiff, proper diverse citizenship was alleged (p. 569). The cause was then tried and a decree rendered. On appeal this court, by his Honor, the CHIEF JUSTICE, held that there was no federal jurisdiction on account of the fatal omission to aver the requisite citizenship when the suit in the state court was commenced.

Kellam vs. Keith, 144 U. S. 568.

The late Mr. JUSTICE BLATCHFORD, in his day, clearly summarized the result of the decisions regarding jurisdiction in causes removed from the state courts on the ground of diverse citizenship, and declared:

> "Where a suit is entered upon the docket of a circuit court as removed on the ground of the diverse citizenship of the parties, and was never in law removed, **no amendment of the record made in the circuit court can affect the jurisdiction of the state court, or put the case rightfully on the docket of the circuit court as of the date when it was so docketed."**

Graves vs. Corbin, 132 U. S. 590.

That ruling was made in a cause which, because of the citizenship of the parties, **could have been maintained in the original jurisdiction of the federal circuit court,** if no objection thereto had been interposed; none was interposed; yet as a REMOVED CASE, after full hearing and a decree in the federal court for plaintiff, who had been **"taken into that court adversely"** (p. 591) the decree was reversed, and the cause was ordered remanded to the state court, following the precept last above quoted, which we respectfully ask to have applied in the case at bar.

It has been held, indeed, that if the removal petition is merely deficient *in form*, but is good in its **substantial**

showing of jurisdictional citizenship, it may be amended in the federal court; but this may **not be,** where (as *in the case at bar*) the removal petition boldly proclaims facts which *forbid* the removal under the existing national laws.

On this point Mr. JUSTICE GRAY, writing for all the court, said:

> "A petition for removal, when presented to the state court, becomes part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and if it does, the Circuit Court of the United States cannot allow an amendment of the petition, but must remand the case. *Crehore vs. Ohio & Mississippi Railway*, 131 U. S. 240; *Jackson vs. Allen*, 132 U. S. 27. But if, upon the face of the petition and of the whole record of the state court, sufficient grounds for removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of that court, by stating more fully and distinctly the facts which support those grounds. *Carson vs. Dunham*, 121 U. S. 421, 427; *Martin vs. Baltimore & Ohio Railroad*, 151 U. S. 673, 690, 691."
>
> Powers vs. Ry., 169 U. S. 101.

The more recent decisions do not impair or limit the scope of those rulings, but on the contrary confirm them.

> Kinney vs. Assn., 191 U. S. 78;
> *Ex parte* Wisner, 203 U. S. 449.

The law regarding *ex post facto* amendments of petitions for removal is settled by your Honors' judgments, sustaining, we respectfully submit, our contentions for petitioner herein.

We respectfully refer in this connection to the emphatic words of the learned CHIEF JUSTICE:

> "We must hold, therefore, as has indeed already been ruled, *Tennessee vs. Union & Planters' Bank*, 152 U. S. 454, 461, that the jurisdiction of the circuit courts on removal by the defendant, under this section, is **limited to such suits as might have been brought** in that court by the plaintiff under the first section. **The question is a question of jurisdiction as such and cannot be waived.**"

Railroad vs. Davidson, 157 U. S. 208.

The precepts announced in these decisions naturally led to the latest ruling which declared that, where the state jurisdiction had not been divested, substantially as provided by the federal law, it **continued to hold the cause.** Assuming that proposition to be well grounded, does it not follow that **no amount of moves,** by either or both parties in the federal court could **cure** fatal blemishes flaunted openly in the removal petition?

Ex parte Wisner, 203 U. S. 449.

Many more decisions could be cited to the same general purport as those above mentioned, but we consider the subject to be so familiar to your Honors as renders further citations unnecessary.

A summary of the established doctrine governing this topic is found in a very useful treatise in general use, as follows:

> "WAIVER OF RIGHT OF REMAND—(1) FOR WANT OF JURISDICTION.—Since the federal court cannot take jurisdiction of a cause by the mere consent of parties, the right to have the cause remanded for want of jurisdiction **cannot be waived by lapse of time** nor **by any proceedings** taken in the cause **in the federal court.**"

Indiana vs. Lake Erie, etc. R. Co., 85 Fed. Rep. 2;
Frisbie vs. Chesapeake, etc. R. Co., 57 Fed. Rep. 1;
Southworth vs. Reid, 36 Fed. Rep. 451;
Bronson vs. St. Croix Lumber Co., 35 Fed. Rep. 634;
Indiana vs. Tolleston Club, 53 Fed. Rep. 18;
Wabash R. Co. vs. Barbour, 73 Fed. Rep. 513;
Mexican Nat. R. Co. vs. Davidson, 157 U. S. 201;
Ayers vs. Watson, 113 U. S. 598;
Mansfield, etc. R. Co. vs. Swan, 111 U. S. 379;
Martin vs. Baltimore, etc. R. Co., 151 U. S. 690;
18 Enc. Pl. & Pr., 369.

We add further:

Crane Co. vs. Guanica Centrale, 132 Fed. 713;
Olds Wagon Works vs. Benedict, 67 Fed. 1;
Parkinson vs. Barr, 105 Fed. 81.

The effect of filing an amended petition after removal, on which the supposed "waiver" here, in the case at bar, is founded, was considered in the decision last above cited. The court's view thereof is briefly given in the headnote as follows:

> "A plaintiff, by appearing in the federal court after the removal of the cause, and obtaining **leave to file an amended complaint,** does NOT thereby waive his right to move to remand."

II.

The right of removal is **determined by the facts as disclosed by the removal petition,** and if the latter is defective *in substance* (and, for stronger reason, if it **affirmatively shows,** as in the case at bar, that the cause is NOT REMOVABLE), neither consent nor failure to raise

the issue of jurisdiction can impart life to the attempt at removal.

If, as held in decisions already cited, a SUBSTANTIAL defect in the petition for removal cannot be amended or cured thereafter so as to confer jurisdiction by averments of requisite diversity of citizenship (truly existing), it follows that federal judicial power over a removal cause **cannot be acquired later** by appearances or by steps in pleading, or even by a trial of the merits, all implying consent to the jurisdiction. So the decisions of this court affirm, on the oft repeated ground that consent does not confer jurisdiction upon removal causes.

It is not to be denied that there are decisions asserting that one sued in the federal court of a district whereof he is not a resident may submit to jurisdiction by not objecting. Whether they are sound or not, in view of the history of the changes in the law of this subject, we do not pause to discuss, content to deal with the actual facts in judgment. Here the federal jurisdiction is not invoked **originally,** but it depends, according to a multitude of decisions, on certain essential steps before it becomes operative, so as to remove and transplant a particular cause OUT OF the state jurisdiction as well as INTO the federal cognizance. That transplanting process has a LAW OF ITS OWN, defined by the statutes on removal of causes. That law has been steadily and definitely construed for years along the lines marked out by the *Stevens* case (130 U. S. 230) and many others already cited. Why should that construction be cast aside? It merely asserts that until the state court's power to deal with the cause is dislodged, by a showing of facts with which the federal power is lawfully authorized to deal, the state jurisdiction continues.

> "'Tis well to be off with the old love
> Before you are on with the new."

We venture to add:

'Tis well to be off with the old court
Before you are into the new!

Unless that precept be obeyed, we shall have divided powers in the same case, in federal and state courts, the evils of which were so well pointed out by Judge SAWYER in his opinion already cited (24 Fed. 657).

The latest and most distinct announcement on this point in this court has been in the *Wisner* case (203 U. S. 449), which we assume was most carefully considered; and it has been followed (in the interpretation which we maintain) in later cases.

Baxter Co. vs. Mfg. Co., 154 Fed. 992;
Yellow Aster Co. vs. Crane Co., 150 Fed. 580;
Goldberg Co. vs. Ins. Co., 152 Fed. 834.

The purport and purpose of the latest amendments of the law regulating federal jurisdiction have been toward limiting and reducing its scope, especially in respect of diverse citizenship. The history of those amendments has been sketched in several learned opinions.

In re Hohorst, 150 U. S. 653;
Cochran vs. County, 199 U. S. 260.

The intent and object of those changes of law, restricting and narrowing the exercise of federal judicial power, are manifest, and have been fully conceded.

Foulk vs. Gray, 120 Fed. 156, and the many decisions cited therein.

Divestiture of state jurisdiction in a pending action can be effected only by substantial compliance with federal law. That law, by its own terms, declares that, if the federal court, **at any time,** becomes satisfied that

a cause is not properly within its authority, it "shall proceed no further therein," but (in case of removal) "remand it to the court from which it was removed," etc.

These provisions should be interpreted in harmony with the general spirit and intent implied by the latest amendments to the law, and not accorded a reading which would defeat the restrictive purposes contemplated by their enactment.

Missouri Pac. Ry. vs. Fitzgerald, 160 U. S. 580.

III.

But if it were possible for a competent party to "waive the question of jurisdiction," such a rule could not apply to the case of an infant plaintiff, whose incapacity to waive any substantial right the courts should always protect.

The attitude of an infant in respect of the subject of waiver (which seems to have been the foremost thought in the mind of the learned trial judge) is different from that of an adult.

It must be noted first that there **has been no appointment of a next friend** in the federal court. The appearance of a next friend, there, cannot be taken to bring the infant within federal jurisdiction. Until a next friend is appointed **"by the court in which the suit is intended to be brought"** or by a judge or clerk thereof (to quote the Missouri Statute, R. S., 1899, Sec. 551) an infant cannot become subject to the jurisdiction of a court.

Coal Co. vs. Hays, 97 Ala. 201 (12 So. 98).
R. S., Mo., 1899, Sec. 556.

The appearance of an infant by a next friend or

guardian *ad litem* is not, of itself, sufficient to bring the person of the infant within the jurisdiction of a court. Even a judgment founded on such an appearance has been held void, and other rulings in many ways assert the force of the last stated proposition.

10 Ency. Pl. & Pr., p. 613 and cases;
Nagel vs. Schilling, 14 Mo. App. 576;
Ingersoll vs. Mangam, 84 N. Y. 622;
Carver vs. Carver, 64 Ind. 194;
Martin vs. Starr, 7 Ind. 224;
Gray vs. Palmer, 9 Cal. 616;
Frazier vs. Pankey, 1 Swan (Tenn.) 75;
Clark vs. Thompson, 47 Ill. 25;
Bonnell vs. Holt, 89 Ill. 72;
Dickison vs. Dickison, 124 Ill. 483;
Fitch vs. Cornell, 1 Sawy. (U. S.) 157;
Greenman vs. Harvey, 53 Ill. 386.

The rule in Missouri on this subject is unquestionable.

Hendricks vs. McLean, 18 Mo. 32;
Gibson vs. Chouteau, 39 Mo. 537;
Shaw vs. Gregoire, 41 Mo. 407;
Railroad vs. Campbell, Nelson & Co., 62 Mo. 585;
Campbell vs. Laclede Gas Light Co., 84 Mo. 352;
Fischer vs. Siekmann, 125 Mo. 165;
Bogart vs. Bogart, 138 Mo. 419.
Wright vs. Hink, 193 Mo. 130;
McMurtry vs. Fairly, 194 Mo. 502, 91 S. W. 90.

The fact that the next friend, appointed in and for the State Court of Missouri, is a citizen of that state, does not confer the requisite jurisdiction to support a removal of the cause to the federal court. The removal petition DOES NOT AVER that he is **a resident of the district** within which the federal court is territorially bounded. If his

citizenship has any significance, the essential allegations on which to found a suit in the federal trial court are wanting in the removal petition.

It may be conceded that representatives of some persons beneficially interested are occasionally vested with such a title or possession of property as to permit their citizenship to sustain federal jurisdiction in cases where they are parties to litigation. Cases can be found holding, in some instances, that citizenship of an executor or guardian will be sufficient to bring his case within federal juridical authority (the other appropriate facts existing). But a **next friend,** appointed to institute a suit for damages, more nearly resembles an attorney. He is not vested with title to property. He is not strictly a party to the suit (although liable for costs, as a security for costs might be) and in determining the question of citizenship for the purpose of locating federal jurisdiction, the citizenship of the infant plaintiff himself and not the next friend must be considered. The citizenship of a next friend, such as the Missouri statutes describe and habilitate, can neither create nor defeat federal jurisdiction. He is not a PARTY TO THE ACTION, within the purview of the federal law concerning diverse citizenship.

Williams vs. Ritchey, 3 Dill. 406;
Blumenthal vs. Craig, 81 Fed. 320;
Crandall vs. Slaid, 11 Metc. 288;
Voss vs. Neineber, 68 Fed. 947;
Morgan vs. Potter, 157 U. S. 195;
Brown vs. Hull, 16 Vt. 673;
Sinclair vs. Sinclair, 13 M. & W. 640;
Jones vs. Railway, 178 Mo., 542;
Bryant vs. Livermore, 20 Min. 343;
Duffy vs. Pinard, 41 Vermont 297;
Mason vs. McCormick, 75 N. C. 263.

His position is rather that of an attorney, with strictly limited powers.

Anon, 2 Hill (N. Y.) 417;
Tate vs. Mott, 96 N. C. 22 (2 S. E. Rep. 176).

A guardian *ad litem* or next friend "cannot, by admissions or stipulations, surrender the rights of the infant."

Kingsbury vs. Buckner, 134 U. S. 680.

A next friend must be appointed by the court "in which the suit is intended to be brought," according to the Missouri statute (R. S., Mo., 1899, Sec. 551), which we assume furnishes a guide to like procedure in the federal court in actions at law, there being no different federal statute, and such procedure being within the scope of the "conformity" act.

R. S., U. S. Sec. 914.

A next friend appointed by a state court could not institute an action for the minor in a federal court, and thereby bring his infant charge into the latter court without an appointment by the federal court, if the ORIGINAL jurisdiction of the latter is to be invoked. The authority of such a representative of a minor is limited to the field or domain in which he is expressly authorized to serve or act.

Morgan vs. Potter, 157 U. S. 197.
R. S., Mo., 1899, Sec. 556.

So that if it is claimed here that the next friend (appointed by the state court) could confer jurisdiction by waiving objection to original jurisdiction in the federal court, we respectfully insist that an **appointment as next friend by the federal court** would be essential for that purpose, under the decisions already cited.

One interesting section of Missouri law casts light on this phase of the case. The Missouri Code of Practice, in the Statute of Jeofails, declares that no verdict or judgment shall be reversed, impaired or affected by:

> "Seventh, for any party under twenty-one years of age having appeared by attorney, if the verdict or judgment be for him."
>
> R. S. Mo. 1899, Sec. 672.

This statute has been frequently enforced.

> Taylor vs. Pullen, 152 Mo. 440;
> Lyddon vs. Dose, 81 Mo. App. 64.

This provision of law implies (when read in conjunction with the sections 551 and 556, requiring appointment of a next friend by the court wherein the action "is intended to be brought," and declaring that such an order of appointment shall be filed, **"before any proceedings shall be had in the cause")** a corollary:— that, without an appointment of a next friend for an infant plaintiff, any proceedings **against his interest** will not be valid.

The terms of section 556 (R. S. Mo., 1899) clearly forbid any steps for an infant plaintiff without appointment of a next friend by the court where the appearance for him is to be made. If it is to be applied, it clearly forbids a **"waiver"** of "objection to jurisdiction" by a next friend, in another court than that of his appointment. This accords with hosts of decisions holding that a judgment or decree, based on a jurisdiction obtained over an infant by appearance of his guardian *ad litem*, is VOID.

> O'Hara vs. MacConnell, 93 U. S. 150;

Ins. Co. vs. Bangs, 103 U. S. 435;
Hatch vs. Ferguson, 57 Fed. 966;
Ingersoll vs. Mangam, 84 N. Y. 622;
Kingsbury vs. Kingsbury, 14 Fed. Cas., p. 585 (No. 7817) and note.

An infant's personal acceptance of service is void to confer jurisdiction over him.

Bass vs. Bass, 78 N. C. 374;
Whitesides vs. Barber, 24 S. C. 373.

His appearance by attorney gives no jurisdiction.

Bailey vs. McGinniss, 57 Mo. 362;
Copeland vs. Yoakum, 38 Mo. 349.

The whole spirit of the law regarding minors and the protection given by all courts to their helplessness, as illustrated by decisions, repel the contention that an infant plaintiff could be properly held to waive, by the acts of his next friend, an important right such as that of moving to remand a cause improperly attempted to be removed into federal jurisdiction.

When a next friend or guardian has been duly appointed by the proper court, such representative of an infant may appropriately take such steps as the court sanctions, in speeding the cause and in fairly executing his trust.

Thompson vs. Land Grant Co., 168 U. S. 451.

But within the range of such duties and powers does not fall the right to make an essential appearance for the infant in another court, otherwise without jurisdiction, and thereby to waive (as is claimed) the right to trial and other proceedings in the court which appointed him.

Berier vs. Berier, 7 Phila. 618.

Thus it was further held that a guardian *ad litem* has no power to choose a tribunal to try the infant's cause, and hence cannot consent validly to submit it for decision by a referee, a master, or to arbitrators.

Jenkins vs. Freyer, 4 Paige 47;
Gamache vs. Prevost, 71 Mo. 84;
Hannum vs. Wallace, 9 Humph. 129;
Fisher vs. Stilson, 9 Abb. Pr. 33 (next friend);
Frazier vs. Pankey, 1 Swan 75.

The same principle was distinctly recognized in

O'Hara vs. MacConnell, 93 U. S. 150;
Ins. Co. vs. Bangs, 103 U. S. 435.

On this particular feature of our case, it gives us pleasure to quote the words of one of the most universally respected judges in our American annals, Mr. JUSTICE CURTIS, as follows:

> "To enable a statute guardian to bind his ward by a proceeding in a court of justice, **some statute authority must be found for his act.**"
>
> Mathewson vs. Sprague, 1 Curt 457 (16 Fed. Cas. No. 9,278).

Where, we ask respectfully, is to be found any statute authority giving a next friend, appointed by a STATE COURT, authority to enter the appearance of his infant plaintiff in a FEDERAL COURT, and thereby subject the infant to a new, original jurisdiction!!!

It is a general and universal rule that a next friend or guardian *ad litem* may not waive or admit away, any **substantial right** of the infant he represents.

Waterman vs. Lawrence, 19 Calif. 210;
Long vs. Mulford, 17 Ohio St. 484.

In the first of these decisions participated Chief Justice FIELD, afterwards a member of this court; and in the second, the counsel engaged adversely were Mr. Thurman and Mr. Matthews, both jurists of wide and high renown. In the latter case we find this statement of the scope of power of such special representatives of infants:

> "His authority is to protect; and the court will not suffer his ward to be prejudiced either by his admissions or his laches. Bingh. on Inf., 135" (p. 503).

We do not wish to be understood as being too persistent in the argument of this branch of our case, lest it be thought that we deem it of paramount importance, which we do not. In our opinion, the principal case was never properly landed in the federal harbor, because of fatal defects in the steps for removal from the state tribunal; that the objection to the jurisdiction could not be waived by any consent, and that it is therefore needless to consider the effect of any alleged waiver. If, however, your Honors should find it necessary to consider the subject of this paragraph of our brief, we believe you will find that principle and authority agree to declare that a next friend *appointed by a different court* cannot confer jurisdiction over an infant by a *mere entry of appearance* in the federal court, an appearance which was, at best, never intended or designed to have such an effect as is now claimed.

IV.

The remedy sought by mandamus is the only adequate one to restore the cause to the state court, whose jurisdiction has never been divested.

It seems needless to discuss the applicability of the

remedy now asked, if our contentions regarding the existing jurisdiction of the state court over the cause are correct. There is no adequate review by writ of error to correct a refusal to remand. It is not a final order; and where the remand is actually made, it is not reviewable by appellate process in the federal field.

Mandamus is the appropriate and only efficient remedy at the service of plaintiff where a United States trial court retains and exercises a jurisdiction not vested therein by the federal laws over a removed cause, belonging in a state court. We consider this proposition so clear and well settled by definite judgments that we refrain from further argument thereof.

Ex parte Wisner, 203 U. S. 449;
Matter of Engineering Co., 194 U. S. 458;
Ex parte Bank, 207 U. S. 61.

We crave pardon for the length of this Brief. The topics involved are interesting to us, and the seeming want of harmony in rulings thereon by some of the circuit courts have led us to submit our views on the disputed points as fully as the time at our command permits. We believe that the jurisdiction of the state court over the principal cause has not yet been divested, and we respectfully pray, on behalf of the infant plaintiff, that the alternative order for a *mandamus* be made peremptory.

GEORGE SAFFORD,
As Next Friend,

Thomas J. Fauntleroy
Shepard Barclay
Attorneys and of Counsel for Petitioner.

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GEORGE SAFFORD,
As Next Friend,

Thos. J. Thatcher
Shepard Barclay

Attorneys and of Counsel for Petitioner.

IN THE

Supreme Court of the United States

IN THE MATTER OF ALBERT NEWTON MOORE, AN INFANT, BY NEXT FRIEND.

[Original Proceeding No. 171.]

The answer of David P. Dyer, Judge of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, and holding the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to the rule upon him to show cause why a mandamus should not issue commanding him in said court to remand the cause of Albert Newton Moore, an infant, by George Safford, his next friend, plaintiff, vs. Louisville & Nashville Railroad Company, defendant, to the Circuit Court of the City of St. Louis, State of Missouri.

Respondent respectfully answers and certifies to the Honorable Supreme Court of the United States:

1. That the petitioner has correctly set out the matters appearing of record in the proceedings in the said suit of Albert Newton Moore, an infant, by George Safford, his next friend, plaintiff, vs. Louisville & Nashville Railroad Company, defendant.

2. That respondent overruled plaintiff's motion to remand the above cause, which motion was filed in the Circuit Court of the United States on October 26, 1907, and

which motion was based on the fact that Albert Newton Moore was not a resident of the District, for the reason that, in the opinion of respondent, plaintiff had waived his privilege to have the cause remanded, by having voluntarily appeared and filed, long prior to the filing of his motion to remand, an amended petition in the Circuit Court of the United States, alleging grounds of negligence in addition to those alleged in plaintiff's petition filed in the Circuit Court of the City of St. Louis, Missouri; by stipulating with defendant in the Circuit Court of the United States for time in which defendant might plead, and by twice stipulating with defendant in the Circuit Court of the United States when the cause was there set for trial, for the continuance of said cause.

3. That respondent overruled plaintiff's motion to reconsider the ruling on said motion to remand, which motion to reconsider was filed on November 19, 1907, and which motion was based on the alleged inability of Albert Newton Moore, an infant, or of George Safford, his next friend, for him, to waive jurisdiction, for the reason that, in the opinion of respondent, George Safford, as such next friend, could waive the privilege of having the case remanded, and had waived it, as aforesaid, and for the further reason that George Safford, the next friend appointed to institute and prosecute the suit, was a citizen and resident of Missouri and it was not shown that he was not a resident of the District of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. George Safford, whose residence, rather than that of Albert Newton Moore, controls, being appointed as next friend for Albert Newton Moore to institute and commence suit, and being a citizen and resident of Missouri, and being possibly a resident of the District, and the removing defendant being incorporated under the laws of Kentucky, the Circuit Court of the United States seemed, in the opin-

ion of respondent, to have full authority to hear and determine the cause.

4. That the foregoing rulings on said motions were made in the exercise of the authority vested in respondent by law, and respondent did not, in making said rulings, abuse the discretion reposed in him; that said rulings if erroneous are properly reviewable by writ of error and not by mandamus.

5. That respondent is advised that it is not necessary for him to make any further or other answer to the rule aforesaid, than is herein contained, nor more specifically to any of the allegations set forth in the petition for mandamus aforesaid, and, having fully answered said rule, he prays to be hence discharged with all proper costs.

And these are the causes and reasons which this respondent offers why a mandamus should not issue commanding him to remand said cause to the Circuit Court of the City of St. Louis, Missouri. But he respectfully submits to the judgment of the court, and will enforce or order any direction given by the court in the premises.

Respondent respectfully refers to the brief of P. Taylor Bryan, Harvey L. Christie and Harold R. Small, counsel, filed in this honorable court, and to the authorities referred to therein, in support and maintenance of the positions assumed by this answer.

DAVID P. DYER,

Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, holding the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

STATEMENT.

On November 16, 1906, a petition was presented to the Circuit Court of the City of St. Louis, Missouri, praying the appointment of George Safford as next friend for Albert Newton Moore, an infant over the age of fourteen years, for the purpose of instituting and prosecuting a suit in that court against the Louisville and Nashville Railroad Company to recover twenty thousand dollars damages for personal injuries received by Albert Newton Moore by reason of the alleged negligence and carelessness of the Louisville and Nashville Railroad Company in the operation of a certain locomotive and train of cars in the city of Mount Vernon, Illinois, on November 10, 1905. The petition alleged that Albert Newton Moore had no legally appointed guardian. George Safford, in the same instrument, consented to act as next friend. The court thereupon ordered the appointment of George Safford to act as next friend for Albert Newton Moore. Afterwards, on the same day, suit was instituted in the Circuit Court of the City of St. Louis, Missouri, returnable to the December term, 1906, thereof, by the filing of a petition entitled Albert Newton Moore, by George Safford, next friend, plaintiff, vs. Louisville & Nashville Railroad Company, defendant. In due time, on December 5, 1907, defendant presented its petition for removal, with bond, alleging Albert Newton Moore to be a resident and citizen of Illinois, George Safford, next friend, to be a resident and citizen of Missouri, and defendant Louisville and Nashville Railroad Company to be a cor-

poration duly incorporated under the laws of Kentucky, and that the recovery sought by plaintiff was twenty thousand dollars. Having heard and duly considered the petition, the court approved the bond and ordered the certification of a transcript of the record to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. On January 31, 1907, the transcript was filed in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. **On March 22, 1907, an amended petition was filed by plaintiff in the Circuit Court of the United States alleging new grounds of negligence.** On March 25, 1907, a stipulation of the parties to the suit was filed permitting defendant to plead on or before March 30, 1907; and on March 30, 1907, defendant filed a motion to strike out plaintiff's amended petition and on the same day filed a motion to make plaintiff's amended petition more definite and certain. On May 20, 1907, a stipulation of the parties was filed continuing the cause which was set for trial on that day. On October 8, 1907, the cause, having been again set for trial, was again continued on the stipulation of the parties. On October 26, 1907, plaintiff filed his motion to remand the cause to the Circuit Court of the City of St. Louis, Missouri, on the ground that the Circuit Court of the United States was without jurisdiction, which motion, having been submitted upon briefs on November 2, 1907, was on November 12, 1907, after having been fully considered, overruled, the court holding the right to remand to have been waived by the general appearance of both plaintiff and defendant in the Circuit Court of the United States. On November 19, 1907, plaintiff filed a motion to reconsider the ruling made on November 12, 1907, on the motion to re-

mand, on the ground that Albert Newton Moore, being an infant, jurisdiction could not be waived by him or by his next friend, George Safford, for him. This motion was overruled for the reason that, in the opinion of the Circuit Court of the United States, George Safford, as next friend, was empowered to waive the privilege of objecting to the jurisdiction of the court where the objection was based on the fact that Albert Newton Moore was not a resident of the District. Moreover, in the opinion of the Circuit Court, as appears by the return herein, George Safford, the next friend appointed by the Circuit Court of the City of St. Louis, Missouri, to institute and prosecute the suit for Albert Newton Moore, was a citizen and resident of Missouri, and as it was not shown that he was not a resident of the District, the respondent would not presume he was not a resident of the district. The residence of George Safford, next friend, and not the residence of the infant Moore, represented by next friend, is the residence to be considered. George Safford, next friend, being possibly a resident of the District, and the removing defendant being incorporated under the laws of Kentucky, the Circuit Court of the United States had, in the opinion of the Circuit Court, unquestioned authority to hear and determine the cause. Exceptions were taken to the overruling of the two motions. On January 27, 1908, the petition for writ of mandamus was filed by plaintiff in the Supreme Court of the United States by leave, and on February 3, 1908, a rule to show cause was issued, returnable February 24, 1908. On application of respondent, with the consent of plaintiff, the return day was changed to March 9, 1908.

BRIEF.

I.

THE WRIT OF MANDAMUS.

Assuming that the determination of the Circuit Court that it had jurisdiction was erroneous, is such decision to be reviewed and reversed by mandamus?

The Act of September 4, 1789, Chapter 20, 1 Stat. 80, 4 Federal Statutes Annotated page 439, provides:

"The Supreme Court shall have power to issue * * * writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under authority of the United States." * * *

The Act of March 3, 1891, Chap. 517, 26 Stat. 826, section 5, as amended by Act of January 20, 1897, Chapter 68, provides, that appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Mandamus will not serve as a writ of error to review an exercise of judicial discretion by the United States Circuit Court in determining that a cause should not

be remanded to the State court, unless the Circuit Court of the United States has abused its discretion.

In re Pollitz, 206 U. S. 323 (1906).
Ex parte Hoard, 105 U. S. 578.
Hannis Taylor's Jurisdiction and Procedure in the United States Supreme Court, sec. 316.

The Circuit Court in the case at bar held that a next friend appointed under the laws of Missouri had power to and did voluntarily appear in the United States Circuit Court. The decision of the Court that jurisdiction attached under such circumstances and in the light of decisions hereinafter referred to, was not an abuse of discretion.

The Judge of the Circuit Court for the Eastern Division of the Eastern District of Missouri, which is in the Eighth Circuit, did not abuse the judicial discretion which by law he had the right to exercise, when he determined that the privilege of having a determination of the controversy in the district of residence of the plaintiff was not, like diversity of citizenship, an indispensable pre-requisite to the jurisdiction of the court, but was a privilege which might be waived by plaintiff by entering a general appearance without objecting on that ground. For, on November 4, 1907, eight days prior to the overruling of the motion to remand in the case at bar, the United States Circuit Court of Appeals for the Eighth Circuit held, in a removal case removed on the ground of diverse citizenship in which neither party was a resident or citizen of the State or District in which the suit was brought, that the plaintiff's voluntary appearance operated as a waiver of his privilege to object on the ground that he was not a resident of the district.

Shanberg vs. Fidelity and Casualty Co., infra, as yet unreported. A certified copy of this opinion is filed herewith.

Certainly the Circuit Judge did not abuse judicial discretion when he adopted the construction of Ex parte Wisner, handed down by the Circuit Court of Appeals for the same circuit.

The Circuit Court of the United States is authorized and required by law—it has in other words, jurisdiction—to determine whether the cause placed under its control by removal proceedings shall continue under its control as a cause within the jurisdiction of the court to try, or whether the cause is one outside the jurisdiction of the court and one which must therefore be remanded to the State court for trial.

Where the remedy by writ of error exists, petitioner can not in good conscience claim that remedy to be inadequate and ask for the issuance of the extraordinary writ of mandamus, when petitioner has been at fault in appearing in the Circuit Court and in waiting nine months before filing his motion to remand, and by so doing has furnished reason for the court to determine it had jurisdiction.

In the Wisner case mandamus issued because it appeared that "absolutely no jurisdiction attached." In re Pollitz, 206 U. S. 331.

In the case at bar it was at least a debatable question whether jurisdiction attached. The court determined that it attached.

In In re Pollitz, 206 U. S., 331, the Court held:

"The application to this court is for the isuance of the writ of mandamus directing the Circuit Court to

reverse its decision although in its nature a judicial act and within the scope of its jurisdiction and discretion.

"But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

II.

JURISDICTION ATTACHED.

Where plaintiff and defendant are citizens of different States and are non-residents of the State and district in which a suit is brought in the State court and the amount involved is over $2,000, the jurisdiction of the United States Circuit Court attaches on removal thereto by defendant if a voluntary general appearance is made therein by plaintiff without objection by him that he is not a resident of the district.

Petitioner contends that the words,

"Where **jurisdiction is founded only on the fact that the action is between citizens of different States,** suit shall be brought only in the district of the residence of either the plaintiff or the defendant,"

in section one of the Act of 1887-1888, are a limitation on the fundamental power of the court, which prevents its trying a case brought in the United States Circuit Court when neither plaintiff nor defendant is a resident of the district, even though defendant voluntarily appears and makes no objection to jurisdiction on that ground.

Petitioner contends that in a cause removed to the United States Circuit Court on the ground of diverse

citizenship by a non-resident defendant, the foregoing clause prevents the court from trying the case, even though the non-resident plaintiff elects to and does submit himself to the jurisdiction of the court rather than cause the case to be remanded to the State court.

In short, petitioner contends that the foregoing clause is a limitation on the fundamental jurisdiction of the court and relies on Ex parte Wisner in support of his contention.

Respondent maintains the wording of the clause itself as well as a century's judicial construction of it and like clauses conclusively establish that it is a venue clause passed for the benefit of the parties, which, being for their benefit, may be waived by them. Respondent also relies on Ex parte Wisner and other cases in support of this position.

Under the Judiciary Act of 1887-88, in any diverse citizenship case brought in the Circuit Court of the United States, the process power of the Court is limited to cases in which either plaintiff or defendants resides within the district of the court. Defendant cannot be properly summoned into court unless plaintiff or defendant resides within the district. When both reside outside the district, and service is had on defendant, defendant may appear specially and object to the jurisdiction of the court, or may not appear at all; in either event the jurisdiction of the court will not attach. Defendant, however, may choose to voluntarily come in and, appearing generally, submit himself to the jurisdiction of the court, for the purpose of having a hearing and a determination of the matter in dispute. When defendant so submits himself, he waives his right to the benefit of the provision passed for his benefit requiring the suit to be brought in the district of residence of either the plaintiff or defendant, and jur-

isdiction attaches. The intention of Congress by the Act of 1887-88, was to restrict the jurisdiction in diverse citizenship cases brought in the United States Circuit Court or removed thereto, and it did restrict it by narrowing the venue to those cases in which plaintiff or defendant is a resident of the district. Nowhere, however, does it appear that Congress intended that the venue privilege so accorded a defendant of being sued in the district of residence of plaintiff or defendant might not be waived by him, or that such privilege would not be waived by a defendant voluntarily submitting himself to the jurisdiction of the court. While the process power of the court might not properly be exercised over a defendant when neither he nor plaintiff resided within the district, and the court for that reason could not acquire jurisdiction over him by process against him if he objected to it, or even if he failed to appear and made no objection, yet, if defendant voluntarily chooses to come in and does come into court and appears therein generally and submits himself to the jurisdiction of the court, jurisdiction of the court over him then attaches.

Under the Judiciary Act of 1887-88, in any case removed to the Circuit Court of the United States by a non-resident defendant on the ground of diverse citizenship, where plaintiff does not reside within the district, and plaintiff and defendant are residents and citizens of different States, plaintiff may either object to the jurisdiction of the Federal Court on the ground that he is not a resident of the district, or plaintiff may voluntarily choose to submit to the jurisdiction of the court over him rather than have a remanding of the cause to the State court. If he so voluntarily submits himself to the jurisdiction of the court without objection to the venue of the action, jurisdiction attaches.

Plaintiff cannot thereafter reconsider his choice and have the Circuit Court divested of the jurisdiction over him, which he by his voluntary action caused to attach.

In support of the foregoing, respondent respectfully submits the following brief of authorities:

The judicial power of the United States extends to controversies between citizens of different States.

> Constitution of the United States, Article III, Section 2.

This clause was intended to secure the citizen against local prejudice which might injure him if compelled to litigate his controversy with another in the tribunals of a State not his own. This object was the avowed purpose of the constitutional provision at the time of its adoption.

> Whelan vs. New York, etc., R. Co. (1888), 35 Fed. 858, 9 Fed. Statutes, Annotated p. 102, Gordon vs. Longest, 16 Peters 97.

By the Judiciary Act of September 24, 1789, c. 20, Section 11, 1 Stat. 78, the Circuit Court of the United States was given jurisdiction "concurrent with the courts of the several States of all suits of a civil nature at common law and in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars * * * and **the suit is between a citizen of the State where the suit was brought and a citizen of another State."** It further provided that "no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ."

Section 12, p. 79, provided that if "a suit be commenced in any State court * * * by a citizen of the State in which the suit is brought against a citizen of another State and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs," on petition filed, etc., a removal can be effected.

In Pollard and Pickett vs. Dwight, et al. (1808), 4 Cranch 421, Dwight and others brought a foreign attachment against Pollard and Pickett, returnable to the County Court of Hartford, Connecticut. The defendants appeared and removed the action to the Circuit Court. Objection was made to the jurisdiction of the Circuit Court. Marshall, C. J., delivering the opinion of the court, held:

"The point of jurisdiction made by plaintiffs in error is considered as free from all doubt. By appearing to the action the defendants in the court below placed themselves precisely in the situation in which they would have stood had process been served upon them, and consequently waived all objections to the non-service of process. Were it otherwise, the duty of the Circuit Court would have been to remand the cause to the State court in which it was instituted, and this court would be bound now to direct that proceeding."

The leading case of Gracie vs. Palmer, 8 Wheat. 699 (1823), is reported as follows:

"**Mr. Webster** moved to dismiss the writ of error in this case for want of jurisdiction. He stated that the plaintiffs below were described to be aliens and subjects of the King of Great Britain, and the defendants Gracie and others to be citizens of the State of New York and the suit was brought in the Circuit Court of Pennsylvania. It did not appear that defendants were inhabitants of or found in the district of Pennsylvania at the time of serving the writ; and he therefore

contended under the 11th section of the Judiciary Act of 1789 c. 20, that no civil suit could be brought against them by original process in that district.

Mr. Chief Justice Marshall stated that the uniform construction under the clause of the act referred to had been that it was not necessary to aver on the record that the defendant was an inhabitant of the district or found therein; that it was sufficient if the Court appeared to have jurisdiction by citizenship or alienage of the parties. The exemption from being sued in a district in which the defendant was not an inhabitant or in which he was not found at the time of serving the process, was the privilege of the defendant which he might waive by a voluntary appearance."

In Toland vs. Sprague (1838), 12 Pet. 300, 327, plaintiff brought suit in the Circuit Court of the United States in Pennsylvania by a process known in Pennsylvania as a foreign attachment. Upon the return of the attachment executed on certain garnishees of defendant, the latter, by his attorney, obtained a rule to show cause why the attachment should not be quashed. which rule was afterwards discharged by the court, after which the defendant appeared and pleaded. Trial was had and a verdict and judgment were rendered in favor of defendant. Plaintiff was a citizen of Pennsylvania and defendant a citizen of Massachusetts but **domiciled** at the time of the institution of the suit without the limits of the United States, to-wit, at Gibraltar, and when the attachment was levied upon his property, was not found within the district of Pennsylvania. The court considered the question whether a foreign attachment could properly be used by the Circuit Court of the United States in cases where the defendant is domiciled abroad and is not found within the district in which the process issues so that it can be served upon him. Barbour, J., delivering the opinion of the court

and construing the eleventh section of the Judiciary Act, 1879, 1 Stat., page 78, held, page 329:

"We think the opinion of the Legislature is manifested to be that the process of a Circuit Court cannot be served without the District in which it is established without the special authority of law therefor * * * The next inquiry is whether, the process of attachment having issued improperly, there has anything been done which has cured the error? We think there is enough apparent on the record to produce that effect. It appears that the party appeared and pleaded to issue. Now, if the case were one of want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties by any act of theirs to give it, but that is not the case. The court had jurisdiction over the parties and the matter in dispute. The objection was that the party defendant, not being an inhabitant of Pennsylvania nor found therein, personal process could not reach him, and that the process of attachment could only be properly issued against a party under circumstances which subject him to process **in personam.** Now this was a personal privilege or exemption which it was competent for a party to waive. Pollard vs. Dwight, 4 Cranch, 421; Barry vs. Foyles, 1 Pet., 311."

In Ex parte Schollenberger (1877) 96 U. S. 369. Waite, C. J., held:

"The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

By Act of March 3, 1875, 18 Stat. 470, chapter 137. jurisdiction was given the Circuit Court "concurrent

with the courts of the several States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars * * * in which there shall be a controversy between citizens of different States," and provided:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving such process or commencing such proceeding."

Sec. 2 of the Act of 1875 provided "that in any suit of a civil nature at law or in equity now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and * * * in which there shall be a controversy between citizens of different States * * * either party may remove said suit into the Circuit Court of the United States for the proper district."

Claflin vs. Insurance Co. (1883), 110 U. S. 81, 88.

By Act of March 3, 1887, 24 Stat. c. 373, p. 552, as corrected by Act of August 13, 1888, 25 Stat., p. 433, chapter 366, Circuit Courts of the United States are given "original cognizance concurrent with the courts of the several States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars * * * in which there shall be a controversy between citizens of different States and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value afore-

said * * * Where the **jurisdiction** is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of residence of either the plaintiff or the defendant."

Section 2 of the Act of 1887-1888 provides: "* * * Any other suit (i. e., other than those arising under the Constitution, etc.) of a civil nature at law or in equity of which the Circuit Courts of the United States are given **jurisdiction** by the preceding section, and which are now pending or which may be hereafter brought in any State court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being non-residents of the State. * * *"

In First National Bank of Charlotte vs. Morgan (1889), 132 U. S. 141, suit was brought against the Bank in the Superior Court of Cleveland County, North Carolina. The Bank was a National Banking Association established at Charlotte, Mecklenburg County, in that State. Defendant filed an answer. Judgment was rendered for plaintiff, which judgment, being affirmed by the Supreme Court of North Carolina, was brought by writ of error to the Supreme Court of the United States. Objection to the jurisdiction of the Superior Court of Cleveland County, North Carolina, was made on the ground that the only court which consistently with the laws of the United States could take cognizance of this action was the one established in the county or city where the Bank was located.

Harlan, J., delivering the opinion of the court, page 145, held:

"This exemption of National Banking Associations from suits in State courts established elsewhere than in the county or city in which such associations were

located was, we do not doubt, prescribed **for the convenience of those institutions** and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process. * * * If the exemption had been claimed by the defendant when appearing in the Superior Court of Cleveland County, it must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State and in the latter tribunal for the first time claimed the immunity granted to it by Congress. This was too late. * * * We are of opinion that its exemption from suits in other courts in the same State was a personal privilege it could waive and which in this case the defendant did waive by appearing and making defense without claiming the immunity granted by Congress. No reason can be suggested why one court of a State rather than another, both being of the same dignity, should take cognizance of a suit against a National Bank, except the convenience of the bank. And this consideration supports the view that **the exemption** of a National Bank from suit except one in the county or city in which it is located, **is a personal privilege which it can claim or not as it deemed necessary."**

In McCormick Harvesting Machine Company vs. Walthers (decided March 3, 1890), 134 U. S. 41, Walthers, a citizen of Nebraska, brought suit July 21, 1887, in the United States Circuit Court for the District of Nebraska, against the McCormick Harvesting Machine Company, incorporated under the laws of Illinois, for maliciously and falsely suing out two attachments against him. Defendant answered but later obtained leave to withdraw its answer and filed a plea to the jurisdiction, alleging that it was not subject to be sued or to be summoned by original process in that district. The plea was overruled and trial was had, re-

sulting in verdict and judgment for plaintiff. A writ of error was sued out from the Supreme Court of the United States, which the defendant moved to dismiss, and united with that motion a motion to affirm. The motion to dismiss the writ of error was sustained.

Mr. Chief Justice Fuller, delivering the opinion of the court, says (p. 43):

"By section 1 of the act of March 3, 1887, 24 Stat. 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, to amend the act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States and regulating the removal of causes from the State courts and for other purposes, it was provided: 'But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is **founded** only **on the fact that the action is between citizens of different States,** suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' The **jurisdiction common to all the Circuit Courts of the United States in respect to the subject matter of the suit and the character of the parties who might sustain suits in those courts is described in the section, while the foregoing clause relates to the district in which a suit may be originally brought.**"

In St. Louis, etc., Ry. vs. McBride (decided May 25, 1891), 141 U. S. 127, an action was commenced September 19, 1890, in the United States Circuit Court for the Western District of Arkansas. Defendant appeared and raised by demurrer not only the question of jurisdiction but also the question of the merits of the case. Plaintiff was a resident of the Western District of Arkansas and defendant was incorporated under the

laws of Missouri. Defendant demurred (1) because the court had no jurisdiction, and (2) because the complaint did not state facts sufficient to constitute a cause of action. By demurring to the complaint as not stating facts sufficient to constitute a cause of action even though in the same demurrer defendant objected to the jurisdiction, the Supreme Court held that defendant had appeared generally, even though there was no service of process on defendant, and also held defendant had waived his privilege to object to the venue (p. 130).

Defendant contended that the case was not one in which jurisdiction was founded only on the fact that the controversy was one between citizens of different States (in which case of course plaintiff, being a resident of the district and defendant being a citizen of another State, jurisdiction unquestionably existed), but that it came within the scope of the other section of the venue clause of the Act of 1887-88, providing that "no civil suit shall be brought before either of said courts, against any person by any original process or proceeding, in any other district than that whereof he is an inhabitant." Defendant was not an inhabitant of the Western District of Arkansas, where the suit was brought. Justice Brewer, speaking for the court, at page 131, says as to this contention:

"Assume that it is true as defendant alleges that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different States, but that it comes within the scope of that other clause which provides that 'no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,' **still the right to insist upon suit only in the one district is a**

personal privilege he may waive and he does waive it by pleading to the merits."

Justice Brewer cites ex parte Schollenberger, supra; Toland vs. Sprague, supra; Pollard vs. Dwight, supra, and Charlotte National Bank vs. Morgan, supra, in support of this principle.

In Shaw vs. Quincy Mining Company (decided 1892), 145 U. S. 444, a suit was brought in the United States Circuit Court for the Southern District of New York, by a citizen of Massachusetts against a corporation of Michigan. The Quincy Mining Company **appeared specially** and moved for an order to set aside the service. This order was granted. A petition for mandamus was applied for and a rule issued to show cause. The writ of mandamus was denied because neither party resided in the district and defendant made timely objection on that ground. Gray, J., delivering the opinion of the court, on page 453, however, employs this significant language:

"The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern District of New York by a citizen of another State, there can be no question of waiver such as has been recognized where a defendant has appeared generally in a suit between citizens of different States brought in the wrong district. Gracie vs. Palmer, 8 Wheat. 699; St. Louis, etc., Ry. vs. McBride, 141 U. S. 127, 131, and cases cited."

This case is referred to at length in Ex parte Wisner 203 U. S. 449, so much relied on by petitioner. In both cases timely objection was made. In neither was there a voluntary appearance.

In Southern Pacific Company vs. Denton (1892), 146 U. S. 202, a suit was brought in the United States

Circuit Court for the Western District of Texas. Plaintiff was a resident of the Eastern District of Texas, and defendant was incorporated under the laws of Kentucky. **A demurrer was filed** by defendant **objecting to the jurisdiction** on the ground that neither party was a resident of the district. The court overruled the demurrer. Defendant excepted and then answered to the merits. A trial was had, resulting in a verdict and judgment for plaintiff. Defendant sued out a writ of error on the question of jurisdiction only. Plaintiff moved to dismiss the writ of error and to affirm the judgment. The judgment was reversed and the case remanded with directions to render judgment for defendant upon demurrer to the petition. On page 206, Justice Gray, however, says:

"It may be assumed that the exemption from being sued in any other district might be waived by the corporation by appearing generally or by answering to the merits of the action without first objecting to the jurisdiction. St. Louis & San Francisco R. Co. vs. McBride, 141 U. S., 127; Texas & Pacific Ry. vs. Cox, 145 U. S., 593."

In Empire Wire Company vs. Empire Mining Company, 150 U. S. 159, in which plaintiff and one defendant were both citizens of Kentucky, Justice Gray cited Shaw vs. Mining Company, supra, for the proposition that if parties are not citizens of different States, there is an entire want of jurisdiction which cannot be waived by the parties, which will be noticed by the court of its own motion (p. 163).

In Central Trust Company vs. McGeorge, 151 U. S. 129 (1894), the Central Trust Company, a corporation of New York, filed a bill in equity in the Circuit Court of the United States for the Western District of Virginia, against the Virginia, Tennessee and Carolina

Steel and Iron Company of New Jersey. The whole question of exemption from being sued out of the District of its domicile is fully reviewed. Ex parte Schollenberger, St. Louis, etc., Ry. Co. vs. McBride; Shaw vs. Quincy Mining Company, and Southern Pacific Company vs. Denton, are considered and the court holds, Shiras, J., delivering the opinion of the court:

"Undoubtedly if the defendant company which was sued in another district than that in which it had its domicile had by a proper plea or motion sought to avail itself of the statutory exemption, the action of the court (in dismissing the complaint) would have been right. But the defendant company did not choose to plead that provision of the statute, but entered a general appearance and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicile is a personal privilege which may be waived and which is waived by pleading to the merits."

In Martin's Administrator vs. Baltimore & Ohio Railroad Company, 151 U. S. 673 (1894), action was brought in a State court in which the action involved a controversy between citizens of different States. The petition for removal by defendant was not filed within the time required by the laws of the State or by rule of the State court to answer or plead to the declaration or complaint of the plaintiff. Objection was not made in the United States court that the petition was filed too late. Objection was made in the Supreme Court of the United States that the Circuit Court had no jurisdiction of the cause because the removal petition was filed too late. Justice Gray, page 688, held:

"The time of filing a petition for the removal of a case from a State court into the Circuit Court of the

United States for trial is **not** a fact in its nature **essential to the jurisdiction** of the national court under the Constitution of the United States, like the fundamental condition of a controversy between citizens of different States. **But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant who does not seasonably object that the suit is brought in the wrong district.** Gracie vs. Palmer, 8 Wheat. 699; Taylor vs. Longworth, 14 Pet. 172, 174; St. Louis & San Francisco Railway vs. McBride, 141 U. S., 127; Texas & Pacific Railway vs. Cox, 145 U. S., 593; Central Trust Co. vs. McGeorge, 151 U. S. 129."

The court held that the objection (to the exercise by the Circuit Court of the United States of jurisdiction over a case otherwise removable, upon the ground that the petition for removal was filed too late) is an objection which may be waived, and that it was waived in the case at bar by an appearance by plaintiff and by his failure to object seasonably.

In Mexican National Railroad Company vs. Davidson (1895), 157 U. S. 201, the Mexican National Construction Company, a citizen of Colorado, assigned certain causes of action against the Mexican National Railroad Company, also of Colorado, to Davidson, a citizen of New York, who on September 11, 1891, brought an action in attachment in the Supreme Court of the State of New York against the Railroad Company, which **removed** the case into the United States Circuit Court for the Eastern District of New York. Davidson, the plaintiff, recovered judgment, from which the Railroad Company sued out its writ of error to the Circuit Court of Appeals of the United States. The Circuit Court of Appeals certified to the Supreme

Court of the United States, among other questions, the question of the jurisdiction of the United States Circuit Court. The record showed that no question as to the jurisdiction of the Circuit Court was raised upon the trial. Chief Justice Fuller, page 207, delivering the opinion of the court, held that the action could not have originally been brought in the Circuit Court of the United States by Davidson, the assignee of the Colorado corporation, against a Colorado corporation, because both parties were in the eyes of the law citizens of the same State. On page 208 the court held that—

"the jurisdiction of Circuit Courts on removal is limited to such suits as might have been brought in that court by the plaintiff under the first section. The question is a question of jurisdiction as such and cannot be waived * * * **It is true that by the first section where the jurisdiction is founded on diversity of citizenship suit is to be brought 'only in the district of residence of the plaintiff or the defendant' and this restriction is a personal privilege of the defendant and may be waived by him. St. Louis & San Francisco Ry. vs. McBride, 141 U. S. 127. Section 2, however, refers to the first part of Section 1 by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought. McCormick Machine Co. vs. Walthers, 134 U. S. 41.**"

In Interior Construction and Improvement Company vs. Gibney (1895), 160 U. S. 217, suit was brought, on June 9, 1890, on a bond, in the Circuit Court of the United States for the District of Indiana, by plaintiff company, incorporated under the laws of New Jersey. Defendants were citizens and residents of the State of Indiana. On June 19th defendants Gibney, McElwaine and Wheeler, by their attorney, entered a general appearance. Gibney never pleaded or answered. Defendant Bartley never appeared or made

any defense. On September 19, 1891, McElwaine and Wheeler pleaded in abatement that Gibney and Bartley were citizens of the State of Pennsylvania and that therefore the court had no jurisdiction. The plaintiff demurred to this plea and, electing to stand upon his demurrer to the plea, the court adjudged that the plaintiff take nothing by its action, and that the defendant recover costs. Justice Gray, delivering the opinion of the court, on page 219 said:

"Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record the court of its own motion will order the action to be dismissed; but the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction and is a matter of personal privilege which the defendant may insist upon or may waive at his election, and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection. Gracie vs. Palmer, 8 Wheat. 699; Toland vs. Sprague, 12 Pet. 300, 330; Ex parte Schollenberger, 96 U. S. 369, 378; St. Louis & S. F. Ry. vs. McBride, 141 U. S. 127; Southern Pacific Company vs. Denton, 146 U. S. 202, 206; Texas & Pacific Ry. vs. Saunders, 151 U. S. 105; Central Trust Company vs. McGeorge, 151 U. S. 129; Southern Express Company vs. Todd, 12 U. S. app. 351."

The court referred to the case of Smith vs. Lyon, 133 U. S. 315, and distinguished it, saying, page 220:

"But in the present case it is unnecessary to decide that question, because one of the principals and both sureties, being all of the defendants who pleaded to the jurisdiction, had entered **a general appearance long be-**

fore they took the objection that the sureties were citizens of another district. Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and of course cannot object that others of the defendants were such. Judgment reversed and case remanded with directions to sustain the demurrer to the plea."

In Cochran et al. vs. Montgomery County (1905), 199 U. S. 260, action was brought January 21, 1902, in the City Court of Montgomery, Alabama, by the County of Montgomery against John J. Cochran, a citizen of that County and State, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland. On February 15, 1902, the Fidelity and Deposit Company presented to the District Judge of the United States for the Middle District of Alabama holding the Circuit Court, its petition for the removal of the cause into the Circuit Court of the United States for that district, on the ground of diverse citizenship and on the further ground of local prejudice. The case came on to be heard in the Circuit Court at the May term, 1902, when the plaintiff moved to remand upon the ground that the Federal Court was without jurisdiction, one of the defendants being a citizen of the same State as the plaintiff. This motion was overruled. Judgment was had, which was reversed and a new trial ordered by the Court of Appeals. The second trial resulted in judgment for plaintiff, which was again reversed and a new trial ordered. The third trial resulted in judgment for plaintiff. Defendant sued out a writ of error in the Court of Appeals on the judgment so affirmed. The writ of error was allowed. Application for certiorari was also made. Chief Justice Fuller delivered the opinion of the court. Cause was ordered remanded to the Circuit Court with direction

to remand to the State Court because the requisite jurisdictional diversity of citizenship did not exist.

In Ex parte Wisner (1906), 203 U. S. 449, Wisner, a citizen of Michigan, commenced an action at law on February 17, 1906, in the Circuit Court of the City of St. Louis, Missouri, against John D. Beardsley, a citizen of the State of Louisiana. March 17th defendant filed his petition for removal, together with the bond required in such case. An order of removal was thereupon entered by the State court and transcript of record was filed in the Circuit Court of the United States. On March 19, 1906, plaintiff moved to remand on the ground that plaintiff was a citizen of Michigan and defendant a citizen of Louisiana and that the court therefore could not acquire jurisdiction. The motion was denied April 2, 1906, the court basing its opinion on Rome Petroleum Company vs. Hughes, 130 Fed. 585. April 23, 1906, leave was granted to file a petition for mandamus as well as petition for prohibition. Justice Fuller, delivering the opinion of the court, and apparently basing the opinion principally on the case of Shaw vs. Quincy Mining Company, 145 U. S. 444, 446, supra, awarded the mandamus. On pages 460 and 461, the court referred to the case of Central Trust Company vs. McGeorge, 151 U. S. 129, and St. Louis, etc., Ry. vs. McBride, 141 U. S. 127, and said, referring to the latter case, that "as the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him on the ground that the suit had been brought in the wrong district. **And there are many other cases to the same effect.**"

In the Wisner case, it is to be noted that the plaintiff, immediately after the filing of the transcript in the

Circuit Court of the United States, moved to remand, so that absolutely no jurisdiction attached.

In re Pollitz (1907), 206 U. S. 323, on page 331, Chief Justice Fuller, referring to the case of Ex parte Wisner, said that in the Wisner case the record showed that "absolutely no jurisdiction attached."

The question decided by the Wisner case was that the defendant, by removing the cause, did not procure the attaching jurisdiction of the United States Circuit Court over the plaintiff. The question was not presented whether jurisdiction attached by removal by defendant to the United States Circuit Court and by a general appearance of the plaintiff.

In Merchants' Heat and Light Co. vs. Clow (1906), 204 U. S. 286, plaintiff, an Illinois corporation, sued defendant, an Indiana corporation.

Defendant moved to quash the return of service, but was overruled. It excepted and then pleaded the general issue **and also a recoupment.**

The question was whether defendant, notwithstanding the motion to quash, by having filed the recoupment claim submitted to the jurisdiction of the court.

Justice Holmes, delivering the opinion of the court, held that by pleading the recoupment defendant made itself an actor and submitted itself to the jurisdiction of the court. By so appearing it waived its right to object.

In Corwin Mfg. Co. vs. Henrici Washer Co. (March 4, 1907), 151 Fed. 938, a removal case, Circuit Judge Lowell held a general appearance by plaintiff in the Circuit Court waived his privilege to object that he was not a resident of the district.

He reaches this result after a consideration of the Wisner case, the case of Central Trust Co. vs. McGeorge, and Martin vs. B. & O. R. R., 151 U. S. 673.

In Louisville and Nashville Railroad Company vs. Fisher, and Scott vs. Louisville and Nashville Railroad Company, reported in 155 Fed. Rep. Adv. Sheets, page 68, decided June 18, 1907, cases exactly in point and cases of removal from the State court, and cases construing Ex parte Wisner, 203 U. S. 449, Judge Lurton speaking for the United States Court of Appeals for the Sixth District, states the law as follows:

"The suits were not brought within either the district of plaintiff or that of defendant, and not being suits which might have been originally brought in the court to which they were removed, were not properly removable to that court from the State court. Ex parte Wisner, 203 U. S. 449. But the defendant corporations might and did waive any objection which they might have made to being sued in a district of which neither they nor the plaintiffs were inhabitants, by themselves removing the suits, and the plaintiffs submitted to the jurisdiction thus invoked, by failing to object in any way to such removal and by submitting to a trial on the merits. This consent by both parties to the jurisdiction takes the case outside the authority of Ex parte Wisner and brings it under Central Trust Co. vs. McGeorge, 151 U. S. 129, which is recognized in the former case (Ex parte Wisner) as an authority when both parties have submitted to a suit in the district of neither; federal jurisdiction otherwise appearing. Corwin Mfg. Co. vs. Henrici Washer Co., 151 Fed. 938."

In Mary Shanberg vs. Fidelity and Casualty Company of New York, decided Nov. 4, 1907, in the U. S. Circuit Court of Appeals for the Eighth Circuit, neither plaintiff nor defendant was, at the time the suit was brought and tried, a citizen of the State or district in which the suit was brought, the plaintiff in error being a citizen and resident of Kansas and the defendant in error being a citizen and resident of the State of New

York. The cause was originally brought in the State court and was removed by the defendant to the Circuit Court of the United States for the Western District of Missouri. Plaintiff contended that the jurisdiction of the United States Circuit Court did not attach, even though the plaintiff had voluntarily appeared therein. Respondent asks the court to especially note this case, inasmuch as it is a case determined by the Court of Appeals of the respondent's circuit and was determined just eight days before respondent reached the same conclusion when he overruled the petitioner's motion to remand.

This opinion is not yet officially reported; a certified copy of it, however, is filed herewith. The Court says:

"The question of jurisdiction was not raised in the court below. No objection whatever to its jurisdiction was made in that court; plaintiff voluntarily appeared, **filed a reply** and proceeded in the trial without objection, the question of jurisdiction being now raised for the first time, in the brief of plaintiff in error filed in this court. It is insisted that the case of Ex parte Wisner, 203 U. S. 499, is controlling in this case and fully sustains the contention of the plaintiff. It must be conceded that there is a statement found in the opinion of the court in that case which tends to give color to this contention, but to determine what was really decided, we must look at the case then before the court. In that case, Wisner, a citizen of the State of Michigan, commenced an action on the State Court in the State of Missouri against Beardsley, a citizen of the State of Louisiana. Beardsley filed his petition to remove the case from the State Court into the Court of the United States for the Eastern Division of the Eastern District of Missouri, on the ground of diversity of citizenship, together with the bond required in such cases; an order of removal was thereupon entered by the State Court and a transcript of the record was filed in the Circuit Court. Wisner moved to re-

mand on the ground that the Circuit Court had not acquired jurisdiction by the removal. The motion was heard and denied. Wisner then applied to the Supreme Court for leave to file a petition for mandamus which was granted and rules entered returnable upon a day fixed and the case submitted on the returns to the rules. The Supreme Court held that the motion to remand to the State Court should have been sustained on the ground that the Circuit Court had no jurisdiction to proceed. It will thus be seen that the Wisner case differs materially from the case at bar in that, in that case the plaintiff took advantage of the first opportunity to raise the question of jurisdiction by presenting his motion to remand upon that ground; whereas, in this case, the plaintiff not only failed to ask that the case be remanded, but voluntarily filed her reply and proceeded to trial, thus bringing the case more nearly within the principle announced by the Supreme Court in the case of Central Trust Company vs. McGeorge, 151 U. S. 129. In the case last cited, the Central Trust Company, a corporation created by and existing under the laws of the State of New York, filed a bill in equity in the Circuit Court of the United States for the Western District of Virginia against the Virginia, Tennessee and Carolina Steel and Iron Company, a corporation created by and existing under the laws of the State of New Jersey. The defendant company entered a general appearance, and joined with the complainant in its prayer for the appointment of a receiver without objection to the jurisdiction. Thereafter the Circuit Court dismissed the bill on the ground that under the Act of 1887, as amended by the Act of 1888, it was without jurisdiction of the cause. The Supreme Court reversed the decree dismissing the bill; holding that exemptions from being sued out of the District of its domicile is a privilege which a corporation may waive, and which is waived by pleading to the merits; and further that the fact that neither the plaintiff nor the defendant resides in the district in which the suit is brought, does not prevent the operation of the waiver. See also Ex parte Schollenberger, 96 U.

S. 369; Bank vs. Morgan, 132 U. S. 141; St. Louis and San Francisco Railway Company vs. McBride, 141 U. S. 127; Southern Express Company vs. Todd, 56 Fed. 104; Memphis Savings Bank et al. vs. Houchens, 52 C. C. A. 176; and cases cited in note on p. 192; Shaw vs. Quincy Mining Company, 141 U. S. 444; Southern Pacific Railway Company vs. Denton, 146 U. S. 202."

In the case of McPhee and McGinnity Company vs. Union Pacific Railroad Company, decided by the U. S. Court of Appeals for the Eighth Circuit, November 27, 1907, suit was originally brought in the United States Circuit Court. This opinion is not officially reported; a certified copy thereof is filed herewith. Defendant, without appearing especially, interposed a demurrer to the bill. Defendant later raised the question of the jurisdiction of the court on the ground that neither he nor the plaintiff resided within the district. The court, Justice Sanborn delivering the opinion, says:

"Counsel for the respondents first contend that the court below was without jurisdiction of the case of McPhee & McGinnity Company because that Company was a corporation of the State of Nevada, and the Union Pacific Railroad Company was a corporation of the State of Utah, so that the suit was not brought in the district of the residence of the plaintiff or of all the defendants (1 U. S. Comp. Stats. 508), and they cite Greeley vs. Lowe, 155 U. S. 58, 68, and Ex parte Wisner, 203 U. S. 449, in support of their position, but the diversity of citizenship and the amount in controversy conferred jurisdiction upon the court below, subject to the right of the respondents to a determination of their controversy in the district of the residence of the plaintiff or of the defendants. **This right, however, was not, like diversity of citizenship, an indispensable pre-requisite to the jurisdiction of the court, but a mere personal privilege which they might waive, and which by interposing general demurrers to the bill, which**

were sustained before they suggested this objection, they did waive. Texas & Pacific Ry. Co. vs. Cox, 145 U. S. 593; Martin vs. B. & O. R. R. Co., 151 U. S. 673, 678; Interior Cons. & Impt. Co. vs. Gibney, 160 U. S. 217, 219; Toland vs. Sprague, 12 Peters, 300, 330; ex parte Schollenberger, 96 U. S. 369, 378; Charlotte National Bank vs. Morgan, 132 U. S. 141, 145; St. L. & S. F. Ry. Co. vs. McBride, 141 U. S. 127, 130; Southern Express Co. vs. Todd, 5 C. C. A. 432, 437, 56 Fed., 104, 109; Van Doren vs. Pennsylvania R. Co., 35 C. C. A., 282, 93 Fed. 260; Hoover & Allen Co. vs. Columbia Straw Paper Co., 68 Fed. 945; Scott vs. Hoover, 99 Fed. 247, 249; Platt vs. Massachusetts Real Estate Co., 103 Fed. 705, 706; U. S. Fidelity & Guaranty Co. vs. Board of Comm'rs, 76 C. C. A. 114, 116, 145 Fed. 144, 146; Shanberg vs. Fidelity & Casualty Co. —— C. C. A. —— Fed. ——, filed Nov. 4, 1907."

In Logan vs. Postal Telegraph & Cable Co., 157 Federal Reporter (advance sheets), page 570, a case brought in the United States Circuit Court, decided January 2, 1908, District Judge Trieber says:

"Before passing upon the demurrer of the defendant telegraph company, a matter of practice should first be disposed of. The complainants are citizens of Illinois, and the defendant a corporation existing under the laws of the State of Texas, but having an agent designated for service of legal process in this district. As Judiciary Act Aug. 13, 1888, c. 866, sec. 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], provides that in actions arising under the Constitution or laws of the United States, no civil suit shall be brought against any person by original process in any other district than that whereof he is an inhabitant, and when the jurisdiction is founded on the fact that there is a diversity of citizenship it shall be brought only in the district of the residence of either the plaintiff or defendant, an objection on the part of this defendant to the jurisdiction of the court would have been fatal. But defendant entered its appearance generally, and filed a general de-

murrer to the sufficiency of the bill, making no objection to being sued in a district of which it is not an inhabitant. After the close of the argument, it having been indicated by the court that the demurrer of the other defendants to the jurisdiction would probably be sustained, this defendant, without leave of the court, filed a paper with the clerk suggesting that the court was without jurisdiction, as neither the plaintiffs nor it were residents of this district. If residence in the district was jurisdictional, it would, of course, be immaterial when the question of jurisdiction was raised, or whether raised at all, for by Judiciary Act of March 3, 1875, c. 137, sec. 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], which is retained by section 6 of the act of 1888, it is made the duty of the court at any stage of the proceedings, when it shall appear to the court that it is without jurisdiction, to dismiss it. But are the foregoing provisions relating to the residence of the parties, if the necessary diversity of citizenship exists or there is a federal question involved, jurisdictional, which may not be waived?

"In Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, there is an expression by the court which would indicate that such is the case; but this was clearly obiter, as that question was neither before the court nor necessary for the determination of the issue involved in that suit. In Central Trust Co. vs. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, which was instituted when the act of 1888 was in force, the identical question was before the court, and it was held that the right to be sued in the district of the residence of either of the parties was merely a privilege, which could be waived and which is waived by pleading to the merits; and the fact that neither plaintiff nor defendant resides in the district in which the suit is brought does not prevent the operation of the waiver. To the same effect are Railway Co. vs. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659, and Railway Co. vs. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829.

"The courts have not been harmonious as to the effect

of the dictum in Ex parte Wisner; the United States Circuit Court of Appeals for the Ninth Circuit holding that its effect is to make the residence of one of the parties to the action in the district jurisdictional, of which the court is bound to take notice, even without objection being made by either party (Yellow Aster, etc., Mining Co. vs. Crane Co., 150 Fed. 580, 80 C. C. A. 566), while the United States Circuit Courts of Appeals for the Sixth and Eighth Circuits have followed the rule laid down in Central Trust Co. vs. McGeorge, those courts in effect holding that that part of the opinion in Ex parte Wisner was obiter and not controlling (L. & N. R. R. vs. Fisher [C. C. A.] 155 Fed. 68; McPhee & McGinnity Co. vs. Union Pac. R. R. [Nov. 27, 1907, 8th Circuit; C. C. A.] 157 Fed. ——; Shanberg vs. Fidelity & Casualty Co. [decided Nov. 4, 1907, 8th Circuit; C. C. A.] 157 Fed. ——; Corwin Mfg. Co. vs. Henrici Washer Co. [C. C.] 151 Fed. 938). As, in the absence of an authoritative decision of the Supreme Court, that of the Circuit Court of Appeals for the Eighth Circuit is conclusive on this court, it follows that it must be held that the filing of the general demurrer by the telegraph company was a waiver of its exemption to be sued in this district, and its paper or motion will be stricken from the files."

In the Matter of Francis S. Reisenberg, 208 U. S. 90, No. 6 Advance Sheets of Opinions of United States Supreme Court of October Term, 1907, page 219, 223, decided January 13, 1908, the Court says, Mr. Justice Peckham delivering the opinion:

"The statutes defining the jurisdiction of the Circuit Court (Act of March 3, 1875, Chapter 137, Section 1; 18 Stat. at L. 470; Act March 3rd, 1887, Chap. 373, Section 1, 24 Stat. at Large, 552; Act August 13, 1888, Chap. 866, Section 1, 25 Stat. at L., 433, U. S. Comp. Stat. 1901, page 507, 508) confer it among other cases where 'there shall be a controversy between citizens of different States in which the matter

exceeds, exclusive of interest and costs, the sum or value aforesaid' ($2,000.00)."

In addition to the foregoing, respondent asks the Court to note the great array of authorities to the same effect collected in Vol. 4 Federal Statutes, Annotated, pp. 317, 305).

The late Judge Amos M. Thayer, in his Jurisdiction of Federal Courts, page 26, section 36, says:

"Waiver of Right to Be Sued in District of Residence—Removal: It has been stated heretofore (ante Sec. 20), that if a case is one of federal cognizance, because of diverse citizenship, or because it involves a federal question, the right of the defendant to be sued in a particular district may be waived by him and is waived by entering a general appearance to the suit. In like manner a plaintiff may waive his right to have a suit tried in the district where the plaintiff or the defendant resides. Thus, where the plaintiff and the defendant to a suit were non-residents of the State and district in which a suit had been brought in the State court, it was held that the defendant could remove the case to the Circuit Court of the United States for that district. Kansas City & T. R. R. Co. vs. Interstate Lumber Co., 37 Fed. Rep. 3. The acts of Congress prescribing the place where a person may be sued are not laws which affect the general jurisdiction of the federal courts. They are laws which confer on the defendant the right to be sued in a certain district, which privilege he may waive if he elects to do so. If the parties are citizens of different States, the defendant may consent to be sued where he pleases. Ex parte Schollenberger, 96 U. S. 369; Sales vs. Insurance Co., 2 Curtis, 212; Bushnell vs. Kennedy, 9 Wall, 387; Claflin vs. Commonwealth Insurance Co., 110 U. S. 81."

Moon on Removal of Causes, who contends that the jurisdiction of the Federal Courts should be strictly construed, nevertheless on page 108, section 65, says:

"A suit against a non-resident may be removed from a State court to the United States Circuit Court for the district in which the suit is pending, though the venue of an original action in the United States Circuit Court would not be in such district. The clause of the removal act now under consideration refers to **jurisdiction** as such, and not to the **venue** of actions."

Citing in support thereof Mexican National Railroad Company vs. Davidson, 157 U. S. 201.

See also to same effect as the foregoing authorities Rose on Federal Procedure. The author considers the venue clause in question under a special chapter entitled "Venue," and states, Section 401f, p. 503, that the provision as to place is not jurisdictional.

See also to same effect Desty on Federal Procedure, Section 26, p. 154.

Jurisdiction of the person is acquired either by service of process within the territorial limits of the jurisdiction upon defendant personally or by his voluntary appearance either in person or by attorney.

17 Enc. of Law, 2nd Edition, p. 1064.

Browne on Jurisdiction, Section 49, says:

"A defendant who resides out of the jurisdiction of the court may appear and waive the jurisdiction or rather the personal right he may have arising from that circumstance."

It would seem therefore that adults can waive the benefit of the venue clause and that when they do jurisdiction attaches.

III.

A NEXT FRIEND MAY WAIVE.

A next friend of Missouri, appointed under the laws of Missouri to institute and prosecute a suit for an infant of Illinois against a defendant of Kentucky, can, on removal of the suit to the Circuit Court of the United States by the non-resident defendant on the ground of diverse citizenship, elect to submit to the jurisdiction of the Circuit Court of the United States or to have the cause remanded to the State court on the ground that the infant is not a resident of the district.

As the plaintiff chose to and did submit to the jurisdiction of the court, and as the jurisdiction of the court thereby attached, the next friend cannot thereafter reconsider his choice and have the court divested of its jurisdiction by his motion to remand the cause to the State court.

Petitioner contends then that (admitting the clause under discussion is a venue clause and that the privilege of a trial in a certain district could be waived by an adult plaintiff by a general appearance) still a next friend can not elect to submit to the jurisdiction of the Circuit Court of the United States on removal, but has power only to move for a remanding to the State court; that the next friend has not, in other words, power to file in the Circuit Court of the United States an amended petition setting out grounds of negligence in addition to those set out in the petition filed in the State court or to stipulate that the cause be continued.

Respondent holds the next friend (if the infant is the plaintiff and person whose residence is to be considered) has power to make this election for the infant.

Respondent also holds that as hereinafter set out the next friend is the plaintiff and his residence is the residence to be considered.

Revised Statutes of Missouri, 1899, provide:

Section 550. Suits by infants may be commenced and prosecuted either, first, by a guardian or curator of such infant; or, second, by a next friend appointed for him in such suit.

Sec. 551. The appointment of a next friend for an infant shall be made by the court in which the suit is intended to be brought or by a judge or clerk thereof.

Sec. 552. Such appointment should be made on the petition in writing of such infant if of the age of 14 years, and the written consent of the person proposed to be next friend to such infant acknowledged before or proved to the court or officer making the appointment.

Sec. 554. Before any person shall be appointed a next friend for an infant in any suit to recover any personal property, debt or damages, he shall, if required by the court or officer to whom application for such appointment shall be made, execute a bond to such infant in double the amount claimed in such suit, with such securities as shall be provided by the court or officer, conditioned that such next friend shall account to such infant for all money, or property which may be recovered in such suit.

Sec. 556. The petition for the appointment of the next friend and the written consent of the person proposed to be next friend and the order of appointment shall be filed in the office of the clerk of the court where the suit is proposed to be brought before any proceedings shall be had in the cause.

Sec. 557. The guardian or next friend of any infant who commences or prosecutes a suit shall be responsible for

the costs thereof, unless such infant be permitted by the court to sue as a poor person as provided by law.

An infant is not bound by a contract for legal services made on his behalf by his guardian or next friend. The next friend is liable for the attorney's fees.

Dillon vs. Bowles, 77 Mo. 603.

Removal transfers the hearing from a State to a national tribunal.

Moon on Removal of Causes, Section 70, p. 118.

A removal of a cause from a State court to a Circuit Court of the United States changes the place of trial. **It is a change of venue.**

Moon on Removal of Causes, Section 205, p. 640.

In Raming vs. Metropolitan St. Ry., 157 Mo. 477, 514 (1900), a case in which it was questioned whether a Missouri next friend could make an affidavit for a change of venue to another State court was considered. The next friend in the affidavit referred to himself as plaintiff.

The court says, p. 514:

"Section 2261, Revised Statutes 1889, requires the application and affidavits for a change of venue to be made by the party, and it has been held that this means the party in his own person and not by agent or attorney. (88 Mo. 226.) But it has never been decided in case of an infant suing by his next friend that the application can not be made by the next friend.

"A next friend is neither the agent nor attorney for his ward. An agent or attorney derives his authority as such from his principal, but an infant cannot appoint an agent and empower him to do an act which in contemplation

of law he is himself incapable of doing. The next friend does not derive his authority from the infant, and his office does not rest on such authority, either express or implied.

"It is because the law regards an infant incapable of conducting a law suit in his own behalf that it has made provisions for the appointment of a next friend to act for him. The next friend derives his authority from the court which appoints him and as he is appointed to institute and conduct the suit it follows that he has authority to do every act which the interest of the infant demands and the law authorizes. If this statute is to be considered so strictly as to deny the next friend the authority to make an application for a change of venue, then we necessarily deny to infants who are unable to act for themselves the equal protection with other litigants that the statute was designed to afford. Not only would this be a rank injustice to a class for whose interests the law has always been watchful, but it would raise a serious question as to the validity of the statute itself. * * * It is intended here to say that in the suit of an infant by his next friend the next friend is the proper person to make the application for a change of venue."

The change of venue so made was upheld.

In Kingsbury vs. Buckner, 134 U. S., 650 (in a case originally brought in an Illinois court, in which State, appeals and writs of error may be taken to the Supreme Court of Illinois, held in the grand division in which the case was decided or by **consent** of the parties to any other grand division) it was held that a guardian *ad litem*, or next friend of an infant, may consent that the case, in which the infant is a party, be heard in some other grand division of the Supreme Court of Illinois than the division in which it was decided, or at a term

of the Supreme Court earlier than such appeal or writ of error would be ordinarily heard, and may waive the execution of an appeal bond by the opposite party, an appeal bond not being essential to the jurisdiction of the Supreme Court.

The court Justice Harlan, delivering the opinion on p. 680, said: "The court whose duty it is to protect the interests of the infant should see to it that they are not bargained away by those assuming or appointed to represent them. But this rule does not prevent a guardian *ad litem* or *prochein amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. * * * **A consent by the next friend or guardian ad litem that a case be heard in a particular division could not possibly prejudice the substantial rights of the infant."**

In the same case, the guardian ad litem waived the benefit of a ten days' notice given by the statute in such cases to take a deposition. It was contended that such guardian could not make such waiver. The court, however, on page 686, held, "The statutory provision requiring ten days' notice for the suing out of a commission to take depositions is **one for the benefit of the party against whom the depositions are to be read and might be waived."**

Under the authority of Raming vs. Metropolitan Ry. (*supra*) a next friend can take a change of venue from one State court to another.

A guardian *ad litem* for an infant defendant has power as evidenced by many decisions to elect to change the place of trial by a removal from a State to a Federal court.

The same next friend has filed an application for a mandamus, to compel a remanding of the cause to the State court, who elected by filing the amended petition in the Circuit Court to have the cause tried in the United States Court rather than in the State court.

Suppose this court grants the application for the writ on the ground that petitioner had no authority to file the amended petition in the Circuit Court of the United States. Who shall say that the next friend will not, when the cause is ordered remanded to the State court, appear before this court and file another application for mandamus to compel the Circuit Court of the United States to **assume** jurisdiction on the ground that petitioner had no power to make the present application?

It is submitted that the reason why petitioner has not power to elect whether to have the cause tried in State or Federal court is involved equally in both instances.

In both instances the claim of lack of authority seems to be without weight.

Because the infant cannot commence and prosecute the suit a next friend who can is appointed. Involved many times in the prosecution of a suit is an election or choice of alternatives. That choice when fairly made is within the power—the necessary power—of the next friend to make. He is bound to make it. He cannot do otherwise and proceed with the case.

There is nothing here to warrant a conclusion that the choice of the Federal forum as the place to try the cause was not fairly made.

The next friend was presented with the question, "Shall I cause this case to be sent back to the State court as I am privileged to do, or shall I not, and have the cause tried in the United States Court." He determined on one alternative as advisable under the circumstances. This decision made, it is submitted it should be held to be finally made.

The next friend had capacity to and did waive the privilege he had to object because the infant was not a resident of the District.

IV.

STATUS OF NEXT FRIEND.

The next friend is the party whose residence under the venue clause is to be considered. George Safford, the next friend, is alleged to be a citizen and resident of Missouri. There was no showing made that he was not a resident of the district. He being a citizen of Missouri and possibly a resident of the District, and the removing defendant being a non-resident corporation of Kentucky, jurisdiction on petitioner's main contention unquestionably exists.

Revised Statutes of Missouri, 1899, provide: Section 539.—There shall be in this State but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action; and the party thereto complaining shall be known as the plaintiff, and the adverse party as the defendant.

Section 540.—Every action shall be prosecuted in the name of the real party in interest except as otherwise provided in the next suggested section. * * *

Section 541.—An executor or administrator, **a trustee of an express trust** or **a person expressly authorized by statute,** may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. The trustee of an express trust within the meaning of this section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

In Mexican Central District Court vs. Eckman, 187 vs. 429, suit was brought in the U. S. Circuit Court for the Western District of Texas by Eckman, a citizen and

resident of that district, as guardian of Alfonso Huesselman a minor, a citizen and resident of Illinois, against the Mexican Central Railway Company, a corporation of Massachusetts, to recover damages for injuries sustained in Mexico through the negligence of the company in whose employ he then was. Chief Justice Fuller delivering the opinion of the Court, on p. 433, says:

"It is true that where a State or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of a United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, notwithstanding the general rule that the jurisdiction of the Federal court depends, not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record. But those are instances of merely formal parties whose names are used from necessity and, as said in New Orleans v. Gaines' Administrator, by Mr. Justice Bradley, "we have repeatedly held that representatives may stand upon their own citizenship in the Federal courts irrespectively of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of Federal jurisdiction by simulated assignments. **But assignments by operation of the law creating legal representatives are not within the mischief or reason of the law.**

If in the State of the forum the general guardian has the right to bring suit in his own name as such as guardian and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is con-

cerned, even though suit might have been instituted in the name of the ward by guardian ad litem or next friend. He is liable for costs in the event of failure to recover and for attorney's fees to those he employs to bring the suit and in the event of success the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond.

In the case at bar under Section 541 of Revised States of Missouri, 1899 (*supra*), suit may be instituted in the name of the next friend; under Section 557, Revised Statutes of Missouri, 1899 (*supra*), the next friend is liable for costs; under the authority of Dillon v. Bowles, 77 Mo. 603, the next friend is liable for attorney's fees; under Section 554, Revised Statutes of Missouri, 1899 (*supra*), the next friend is liable under his bond required in such cases.

As stated in Raming vs. Metropolitan St. Ry., 157 Mo. 477, 514, "a next friend is not the agent or attorney of his ward. The next friend does not derive his authority from the infant and his office does not rest on such authority either express or implied. It is because the law regards an infant incapable of conducting a law suit in his own behalf that it has made provisions for the appointment of a next friend to act for him."

The next friend stands, it is submitted, as the responsible person involved in the commencement and prosecution of the suit, and he rather than the infant is the one whose residence should be considered.

All of which is respectfully submitted.

P. TAYLOR BRYAN,
HARVEY L. CHRISTIE,
HAROLD R. SMALL,
Counsel for Respondent.

MATTER OF ALBERT N. MOORE, AN INFANT PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

No. 17, Original. Argued March 9, 1908.—Decided April 20, 1908.

In either case, the filing by the defendant of a petition for removal, the filing by the plaintiff after removal of an amended complaint or the giving of a stipulation for continuance, amounts to the acceptance of the jurisdiction of the Circuit Court.

A next friend may select one of several tribunals in which the infant's case shall be tried, and may elect to accept the jurisdiction of the Federal court to which the case may be removed.

While consent cannot confer on a Federal court jurisdiction of a case of which no Federal court would have jurisdiction, either party may waive

the objections that the case was not brought in, or removed to, the particular Federal court provided by the statute.

Nothing in *Ex parte Wisner*, 203 U. S. 449, changes the rule that a party may waive the objection to the jurisdiction in respect to a particular court where diversity of citizenship actually exists.

THIS is an application by petitioner for a writ of mandamus to compel the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri to remand the case of this petitioner *v.* The Louisville and Nashville Railroad Company to the state court, from whence it came.

The facts are these: On November 16, 1906, Albert Newton Moore, an infant, over the age of fourteen years, presented his petition to the Circuit Court of the city of St. Louis, Missouri, stating that he desired to institute a suit in that court against the Louisville and Nashville Railroad Company, and praying for the appointment of a next friend, whereupon George Safford, of St. Louis, was duly appointed such next friend. Thereupon a petition was filed in said state court in the name of Moore, by his next friend, against the Louisville and Nashville Railroad Company, to recover damages for personal injuries. After service of summons, but before answer was due, the railroad company filed its application for removal to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. This application for removal was based on the ground of diverse citizenship, and alleged that the plaintiff Moore was a citizen and resident of the State of Illinois; that Safford, the next friend, was a resident and citizen of the State of Missouri, and the defendant, a corporation created and existing under the laws of the State of Kentucky and a citizen and resident of that State. The petition and bond were in due form, and the case was transferred to the United States Circuit Court. Thereafter, and on March 22, 1907, the plaintiff filed in that court an amended petition. On March 25, by stipulation of the parties, the defendant was given time to plead to the plaintiff's amended petition. Three or four times thereafter stipu-

lations for continuances were entered into by the counsel for both sides. At the September term, 1907, a motion to remand, made by the plaintiff, was overruled, and a subsequent application to reconsider this ruling was also overruled. Thereupon this application for mandamus was presented.

Mr. Thomas T. Fauntleroy and *Mr. Shepard Barclay*, for petitioner, submitted:

The petition for removal discloses by affirmative facts that the case was not removable, and hence the jurisdiction of the state court was not divested, but continues. The Federal law ordains that where the foundation of jurisdiction in the Federal court rests upon diverse citizenship "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 Stat. c. 366, p. 434; 4 Fed. Stats. An., p. 366.

This is a prohibition as well as an authority. It excludes (by use of the word "only") Federal jurisdiction in cases where suit is brought otherwise than as authorized, in the district of residence of either plaintiff or defendant.

When the removal petition was filed in the state court this cause was not removable on the facts therein alleged. Those facts made a clear showing that the cause was not subject to be removed. Hence the jurisdiction of the state court was not divested. It continues, despite the filing of the insufficient and totally deficient petition for removal. *Crehore* v. *Ohio &c. Ry.*, 131 U. S. 244; *Ayres* v. *Wiswall*, 112 U. S. 190, 191; *Young* v. *Parker*, 132 U. S. 267, 271; *La Confiance Comp'ie* v. *Hall*, 137 U. S. 61; *Stevens* v. *Nichols*, 130 U. S. 230; *Kellam* v. *Keith*, 144 U. S. 568; *Graves* v. *Corbin*, 132 U. S. 571; *Jackson* v. *Allen*, 132 U. S. 34; *Mattingly* v. *Railroad*, 158 U. S. 53.

A plaintiff, by appearing in the Federal court after the removal of the cause, and obtaining leave to file an amended complaint, does not thereby waive his right to move to remand. *Endy* v. *Ins. Co.*, 24 Fed. Rep. 657; *State* v. *Potter*,

16 Kansas, 80; *Robinson* v. *Walker*, 45 Missouri, 120; *Moulder* v. *Anderson*, 63 Mo. App. 39; *Latham* v. *Edgerton*, 9 Cow. 229; *Cameron* v. *Hodges*, 127 U. S. 325; *Turnbull* v. *Ross*, 141 Fed. Rep. 649; *Crane Co.* v. *Guanica Centrale*, 132 Fed. Rep. 713; *Cella* v. *Brown*, 144 Fed. Rep. 724; *Mitchell Co.* v. *Worthington*, 140 Fed. Rep. 947; *Stevens* v. *Nichols*, 130 U. S. 230; *Mattingly* v. *Railroad*, 158 U. S. 53; *Graves* v. *Corbin*, 132 U. S. 585; *Merchants Co.* v. *Ins. Co.*, 151 U. S. 384; *Railway* v. *Twitchell*, 59 Fed. Rep. 727; *Crasswell* v. *Belanger*, 56 Fed. Rep. 529; *MacNaughton* v. *Railway*, 19 Fed. Rep. 881; *Indiana* v. *Lake Erie &c. R. Co.*, 85 Fed. Rep. 2; *Frisbie* v. *Chesapeake &c. R. Co.*, 57 Fed. Rep. 1; *Southworth* v. *Reid*, 36 Fed. Rep. 451; *Bronson* v. *St. Croix Lumber Co.*, 35 Fed. Rep. 634; *Indiana* v. *Tolleston Club*, 53 Fed. Rep. 18; *Wabash R. Co.* v. *Barbour*, 73 Fed. Rep. 513; *Mexican Nat. R. Co.* v. *Davidson*, 157 U. S. 201; *Ayers* v. *Watson*, 113 U. S. 598; *Mansfield &c. R. Co.* v. *Swan*, 111 U. S. 379; *Martin* v. *Baltimore &c. R. Co.*, 151 U. S. 690; 18 Enc. Pl. & Pr. 369.

The right of removal is determined by the facts as disclosed by the removal petition, and if the latter is defective in substance (and, for stronger reason, if it affirmatively shows, as in the case at bar, that the cause is not removable), neither consent nor failure to raise the issue of jurisdiction can impart life to the attempt at removal. *Baxter Co.* v. *Mfg. Co.*, 154 Fed. Rep. 992; *Yellow Aster Co.* v. *Crane Co.*, 150 Fed. Rep. 580; *Goldberg Co.* v. *Ins. Co.*, 152 Fed. Rep. 834; *In re Hohorst*, 150 U. S. 653; *Cochran* v. *Montgomery County*, 199 U. S. 260.

If it were possible for a competent party to "waive the question of jurisdiction," such a rule could not apply to the case of an infant plaintiff, whose incapacity to waive any substantial right the courts should always protect. *Coal Co.* v. *Hays*, 97 Alabama, 201 (12 So. Rep. 98); R. S. Mo., 1899, § 556; 10 Ency. Pl. & Pr., p. 613 and cases; *Nagel* v. *Schilling*, 14 Mo. App. 576; *Ingersoll* v. *Mangam*, 84 N. Y. 622; *Carver* v. *Carver*, 64 Indiana, 194; *Martin* v. *Starr*, 7 Indiana, 224; *Gray* v. *Palmer*, 9 California, 616; *Frazier* v. *Pankey*, 1 Swan (Tenn.),

75; *Clark* v. *Thompson*, 47 Illinois, 25; *Bonnell* v. *Holt*, 89 Illinois, 72; *Dickison* v. *Dickison*, 124 Illinois, 483; *Fitch* v. *Cornell*, 1 Sawy. (U. S.) 157; *Greenman* v. *Harvey*, 53 Illinois, 386.

The rule in Missouri on this subject is unquestionable. *Hendricks* v. *McLean*, 18 Missouri, 32; *Gibson* v. *Chouteau*, 39 Missouri, 537; *Shaw* v. *Gregoire*, 41 Missouri, 407; *Railroad* v. *Campbell, Nelson & Co.*, 62 Missouri, 585; *Campbell* v. *Laclede Gas Light Co.*, 84 Missouri, 352; *Fischer* v. *Siekmann*, 125 Missouri, 165; *Bogart* v. *Bogart*, 138 Missouri, 419; *Wright* v. *Hink*, 193 Missouri, 130; *McMurtry* v. *Fairly*, 194 Missouri, 502; *S. C.*, 91 S. W. Rep. 90.

Mr. Harold R. Small, with whom *Mr. Harvey L. Christie* and *Mr. P. Taylor Bryan* were on the brief, for respondent:

Mandamus will not serve as a writ of error to review an exercise of judicial discretion by the United States Circuit Court in determining that a cause should not be remanded to the state court, unless the Circuit Court of the United States has abused its discretion. *In re Pollitz*, 206 U. S. 323 (1906); *Ex parte Hoard*, 105 U. S. 578; Taylor's Jurisdiction and Procedure in the U. S. Sup. Ct. § 316.

Where plaintiff and defendant are citizens of different States and are non-residents of the State and district in which a suit is brought in the state court and the amount involved is over $2,000, the jurisdiction of the United States Circuit Court attaches on removal thereto by defendant if a voluntary general appearance is made therein by plaintiff without objection by him that he is not a resident of the district. *Whelan* v. *New York &c. R. Co.*, 35 Fed. Rep. 858; *Gordon* v. *Longest*, 16 Pet. 97; *Pollard et al.* v. *Dwight et al.*, 4 Cranch, 421; *Gracie* v. *Palmer*, 8 Wheat. 699; *Toland* v. *Sprague*, 12 Pet. 300; *Ex parte Schollenberger*, 96 U. S. 369; *Claflin* v. *Ins. Co.*, 110 U. S. 81, 88; *First Nat. Bank* v. *Morgan*, 132 U. S. 141; *McCormick Co.* v. *Walthers*, 134 U. S. 41; *St. Louis &c. Ry.* v. *McBride*, 141 U. S. 127; *Empire Wire Co.* v. *Empire Mining Co.*, 150 U. S. 159; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129; *Mar-*

tin's Admr. v. *B. & O. R. R. Co.*, 151 U. S. 673; *Mexican Nat. R. R. Co.* v. *Davidson*, 157 U. S. 201; *Interior Construction &c. Co.* v. *Gibney*, 160 U. S. 217; *Ex parte Wisner*, 203 U. S. 449, discussed and distinguished.

A next friend, a citizen of Missouri, appointed under the laws of Missouri to prosecute a suit for an infant of Illinois against a defendant of Kentucky, can, on removal of the suit to the Circuit Court of the United States by the non-resident defendant on the ground of diverse citizenship, elect to submit to the jurisdiction of the Circuit Court of the United States or to have the cause remanded to the state court on the ground that the infant is not a resident of the district.

As the plaintiff chose to and did submit to the jurisdiction of the court, and as the jurisdiction of the court thereby attached, the next friend cannot thereafter reconsider his choice and have the court divested of its jurisdiction by his motion to remand the cause to the state court. Revised Statutes of Missouri, 1899, §§ 551, 552, 554, 556 and 557; *Dillon* v. *Bowles*, 77 Missouri, 603; Moon on Removal of Causes, § 70, p. 118; *Raming* v. *Metropolitan Street Ry.*, 157 Missouri, 477, 514; *Kingsbury* v. *Buckner*, 134 U. S. 650.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

It was held in *Ex parte Wisner*, 203 U. S. 449, that:

"Under sections 1, 2, 3 of the act of March 3, 1875, 18 Stat. 470, as amended by the act of March 1, 1887, 24 Stat. 552, corrected by the act of August 13, 1888, 25 Stat. 433, an action commenced in a state court, by a citizen of another State, against a non-resident defendant, who is a citizen of a State other than that of the plaintiff, cannot be removed by the defendant into the Circuit Court of the United States."

On the authority of this case it is contended by petitioner that as in this action none of the parties were citizens of the State of Missouri, it could not be removed by the defendant

into the Circuit Court of the United States, and that upon the failure of the United States Circuit Court to remand the case to the state court in which it was originally brought mandamus from this court is an appropriate remedy. But in that case the plaintiff never consented to accept the jurisdiction of the United States court, while in this case it is contended that both parties did so consent, and that therefore the decision in that case is not controlling.

This brings up two questions, first, whether both parties did consent to accept the jurisdiction of the United States court; and, second, if they did, what effect such consent had upon the jurisdiction of the United States court.

That the defendant consented to accept the jurisdiction of the United States court is obvious. It filed a petition for removal from the State to the United States court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had. After the removal the plaintiff, instead of challenging the jurisdiction of the United States court by a motion to remand, filed an amended petition in that court, signed a stipulation giving time to the defendant to answer; and then both parties entered into successive stipulations for a continuance of the trial in that court. Thereby the plaintiff consented to accept the jurisdiction of the United States court, and was willing that his controversy with the defendant should be settled by a trial in that court. The mere filing of an amended petition was an appeal to that court for a trial upon the facts averred by him as they might be controverted by the defendant. And this, as we have seen, was followed by repeated recognitions of the jurisdiction of that court.

That a next friend may select the tribunal in which the suit shall be brought is clear. While he may do nothing prejudicial to the substantial rights of the minor, yet the mere selection of one out of many tribunals having jurisdiction cannot be considered as an act to the latter's prejudice. Certainly the election to accept the jurisdiction of a court of the United States is not an act prejudicial to substantial rights. In *Kings-*

bury v. *Buckner*, 134 U. S. 650, where the next friend consented that a case on a writ of error might be heard in some other grand division of the Supreme Court of Illinois than the one in which it was decided, and at a term of that court earlier than such writ of error could ordinarily be heard, and also waived the execution of an appeal bond by the opposite party, it was held that the infant was bound by such action, the court saying (p. 680):

"Now it is contended that the Supreme Court of the State, sitting in the Central Grand Division, could not, except by consent, entertain jurisdiction of those appeals, and that the next friend and guardian *ad litem* was incapable, in law, of giving such consent. It is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming or appointed to represent him. But this rule does not prevent a guardian *ad litem* or *prochein amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved."

Again, in *Thompson* v. *Maxwell Land Grant Company*, 168 U. S. 451, where the question was whether the infant was bound by a consent decree, it was said (p. 462):

"That infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit. In 1 Dan. Ch. Pl. & Pr. 163, it is said: 'Although the court usually will not, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit.'

* * * * * * * *

"In *Walsh* v. *Walsh*, 116 Massachusetts, 377, a decree had

been entered as follows: 'And the plaintiff and the defendants, . . . Thomas Keys, . . . and also in his capacity of guardian *ad litem* of Bridget Walsh and William Walsh, consenting to the following decree: And this court being satisfied upon the representations of counsel that the decree is fit and proper to be made as against the said Bridget and William; it is thereupon ordered, and adjudged, and decreed,' etc.

"On a bill of review, filed by the minors, this decree was challenged, among other reasons, on the ground that it appeared to have been made by consent of their guardian *ad litem* and upon the representations of counsel without proof. The court decided against the contention, and speaking in reference thereto, through Mr. Chief Justice Gray, said:

" 'An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Tillotson* v. *Hargrave*, 3 Madd. 494; *Levy* v. *Levy*, 3 Madd. 245. And a compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat* v. *Holley*, 1 Beav. 423; *Brooke* v. *Mostyn*, 33 Beav. 457, and 2 De C. J. & S. 373.

" 'If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. *Wall* v. *Bushby*, 1 Bro. Ch. 484; 1 Dan. Ch. Pr. 164. The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal or review. *Webb* v. *Webb*, 3 Swanst, 658; *Harrison* v. *Rumsey*, 2 Ves. Sen. 488; *Bradish* v. *Gee*, Ambl. 229; *S. C.*, 1 Keny. 73; *Downing* v. *Cage*, 1 Eq. Cas. Ab. 165; *Toder* v. *Sansam*, 1 Bro. P. C. (2d ed.) 468; *French* v. *Shotwell*, 5 Johns. Ch. 555.' "

This also seems to be the settled law of Missouri. *Raming* v.

Metropolitan Street Railway, 157 Missouri, 477. In that case it was held that the next friend was the party to make application and affidavit for a change of venue from one state court to another, and the court said (p. 514):

"Section 2261, Revised Statutes 1889, requires the application and affidavits to be made by the party, and it has been held that this means the party in his own person and not by agent or attorney. *Squire* v. *Chillicothe*, 89 Missouri, 226. But it has never been decided in case of an infant suing by his next friend that the application cannot be made by the next friend.

"A next friend is neither the agent nor attorney for his ward. An agent or attorney derives his authority as such from his principal, but an infant cannot appoint an agent and empower him to do an act which in contemplation of law he is himself incapable of doing. The next friend does not derive his authority from the infant, and his office does not rest on such authority, either express or implied.

* * * * * * * *

"It is because the law regards an infant incapable of conducting a law suit in his own behalf that it has made provisions for the appointment of a next friend to act for him. The next friend derives his authority from the court which appoints him, and as he is appointed to institute and conduct the suit it follows that he has authority to do every act which the interest of the infant demands and the law authorizes. If this statute is to be considered so strictly as to deny the next friend the authority to make an application for a change of venue, then we necessarily deny to infants who are unable to act for themselves the equal protection with other litigants that the statute was designed to afford. Not only would this be rank injustice to a class for whose interests the law has always been watchful, but it would raise a serious question as to the validity of the statute itself. . . . It is intended here to say that in the suit of an infant by his next friend, the next friend is the proper person to make the application for a change of venue."

Turning now to the other question, the Constitution, Art. III, § 2, provides that the judicial power of the United States shall extend to controversies "between citizens of different States." Section 11 of the Judiciary Act of 1789 (1 Stat. 78) granted to the Circuit Courts original cognizance "of all suits of a civil nature at common law or in equity . . . where the suit is between a citizen of the State where the suit is brought, and a citizen of another State," and added: "And no civil suit shall be brought before either of said courts (Circuit or District) against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Section 12 (p. 79) provided "that if a suit be commenced in any state court . . . by a citizen of the State in which the suit is brought against a citizen of another State," a removal might be had of the case to the next Circuit Court to be held in the district where the suit is pending. The first section of the act of August 13, 1888, c. 866, 25 Stat. 433, like the Judiciary Act, invested the Circuit Courts of the United States with original cognizance of suits in which there is a controversy between citizens of different States, provided that no civil suit should be brought before either of said courts (Circuit or District) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, and closed with these words, "but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The second sentence of § 2 prescribed, in respect to removals, that "any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United St[illegible]are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Courts of the United States for the proper district by the defendant or defendants therein, being non-residents of that State." It will thus be

seen that by both the act of 1789 and that of 1888 there is a general grant to Circuit Courts of jurisdiction over controversies between citizens of different States, and in each of them there is a limitation as to the district in which the action must be brought. In the light of this similarity between these two acts must the second question be considered.

The contention is that as this action could not have been originally brought in the Circuit Court for the Eastern District of Missouri by reason of the last provision quoted from § 1, it cannot under § 2 be removed to that court, as the authorized removal is only of those cases of which by the prior section original jurisdiction is given to the United States Circuit Courts. But this ignores the distinction between the general description of the jurisdiction of the United States courts and the clause naming the particular district in which an action must be brought.

It may be well to examine the authorities touching this matter. In *Gracie* v. *Palmer*, 8 Wheat. 699, the court, by Mr. Chief Justice Marshall, held that:

"The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance."

In *Toland* v. *Sprague*, 12 Pet. 300, 330, Mr. Justice Parbour thus stated the rule:

"Now, if the case were one of a want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties, by any act of theirs, to give it. But that is not the case. The court had jurisdiction over the parties and the matter in dispute; the objection was, that the party defendant, not being an inhabitant of Pennsylvania, nor found therein, personal process could not reach him; and that the process of attachment could only be properly issued against a party under circumstances which subjected him to process *in personam*. Now this was a personal privilege or exemption, which it was competent for the party to waive.

Pollard v. *Dwight*, 4 Cranch, 421; *Barry* v. *Foyles*, 1 Pet. 311."

In *Ex parte Schollenberger*, 96 U. S. 369, 378, Mr. Chief Justice Waite said:

"The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

In *First National Bank of Charlotte* v. *Morgan*, 132 U. S. 141, 145, Mr. Justice Harlan thus referred to a kindred question:

"This exemption of national banking associations from suits in state courts, established elsewhere than in the county or city in which such associations were located, was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process. . . . If it (the exemption) had been claimed by the defendant when appearing in the Superior Court of Cleveland County, it must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State, and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late. . . . We are of opinion that its exemption from suits in other courts of the same State was a personal privilege that it could waive, and which, in this case, the defendant did waive, by appearing and making defense without claiming the immunity granted by Congress."

In *McCormick Harvesting Machine Company* v. *Walthers*, 134 U. S. 41, 43, Mr. Chief Justice Fuller, quoting the provisions of § 1 of the act of 1888, said:

"The jurisdiction common to all Circuit Courts of the Uni-

ted States in respect to the subject-matter of the suit and the character of the parties who might sustain suits in those courts is described in the section, while the foregoing clause [the last clause in the section] relates to the district in which a suit may be originally brought."

In *St. Louis &c. Railway Company* v. *McBride*, 141 U. S. 127, 131, it was said:

"Assume that it is true, as defendant alleges, that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different States, but that it comes within the scope of that other clause, which provides that 'no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant,' still the right to insist upon suit only in the one district is a personal privilege which he may waive and he does waive it by pleading to the merits.

* * * * * * * *

"Without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit had been brought in the wrong district. *Charlotte Nat. Bank* v. *Morgan*, 132 U. S. 141; *Fitzgerald Construction Company* v. *Fitzgerald*, 137 U. S. 98."

In *Shaw* v. *Quincy Mining Company*, 145 U. S. 444, 453, a case arising after the act of 1888, and in which the defendant promptly raised the question of jurisdiction, Mr. Justice Gray referred to this matter in these words:

"The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern District of New York, by a citizen of another State, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different States, brought in the wrong district. *Gracie* v. *Palmer*, 8

Wheat. 699; *St. Louis &c. Ry.* v. *McBride*, 141 U. S. 127, 131, and cases cited."

See also *Southern Pacific Company* v. *Denton*, 146 U. S. 202.

In *Central Trust Co.* v. *McGeorge*, 151 U. S. 129, 132, an action after the act of 1888 was in force, and in which neither party was a citizen of the State or resided in the district in which the action was brought, Mr. Justice Shiras used this language:

"Undoubtedly, if the defendant company which was sued in another district than that in which it had its domicil, had, by a proper plea or motion, sought to avail itself of the statutory exemption, the action of the court (in dismissing the complaint) would have been right. But the defendant company did not choose to plead that provision of the statute, but entered a general appearance and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicil is a personal privilege which may be waived, and which is waived by pleading to the merits."

In *Martin's Administrator* v. *Baltimore & Ohio Railroad Company*, 151 U. S. 673, where objection was made to a removal on the ground that the removal petition was filed too late, Mr. Justice Gray, on page 688, observed:

"The time of filing a petition for the removal of a case from a state court into the Circuit Court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court under the Constitution of the United States, like the fundamental condition of a controversy between citizens of different States. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant who does not seasonably object that the suit is brought in the

wrong district. *Gracie* v. *Palmer*, 8 Wheat. 699; *Taylor* v. *Longworth*, 14 Pet. 172, 174; *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593; *Central Trust Company* v. *McGeorge*, 151 U. S. 129."

In *Mexican National Railroad Company* v. *Davidson*, 157 U. S. 201, 208, Mr. Chief Justice Fuller, after stating that the action could not have been originally brought in the Circuit Court of the United States because both parties were, in the eyes of the law, citizens of the same State, added:

"It is true that by the first section, where the jurisdiction is founded on diversity of citizenship, suit is to be brought 'only in the district of residence of the plaintiff or the defendant,' and this restriction is a personal privilege of the defendant and may be waived by him. *St. Louis & San Francisco Ry.* v. *McBride*, 141 U. S. 127. Section 2, however, refers to the first part of section 1, by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought. *McCormick Machine Co.* v. *Walthers*, 134 U. S. 41."

In *Interior Construction & Improvement Company* v. *Gibney*, 160 U. S. 217, 219, Mr. Justice Gray thus stated the law:

"Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived by entering a general appearance, without taking the objection."

In *Ex parte Wisner*, *supra*, Mr. Chief Justice Fuller, referring

to *St. Louis &c. Railway Company* v. *McBride*, 141 U. S. 127, said:

"As the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him on the ground that the suit had been brought in the wrong district. And there are many other cases to the same effect."

Several other cases in this court, as well as many in the Circuit Courts and Circuit Courts of Appeal, might be noticed, in which a similar ruling as to the effect of a waiver was announced. It is true that in most of the cases the waiver was by the defendant, but the reasoning by which a defendant is precluded by a waiver from insisting upon any objection to the particular United States court in which the action was brought compels the same conclusion as to the effect of a waiver by the plaintiff of his right to challenge that jurisdiction in case of a removal. As held in *Kinney* v. *Columbia Saving & Loan Association*, 191 U. S. 78, a petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the Federal court, and if when the defendant is brought into a Federal court by the service of original process he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the Federal court by the process of removal, may in like manner waive his objection to that court. So long as diverse citizenship exists the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a state court, and if any objection arises to the particular court which does not run to the Circuit Courts as a class that objection may be waived by the party entitled to make it. As we have seen in this case, the defendant applied for a removal of the case to the Federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in

that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction.

Special reliance is placed by petitioner upon this statement in the *Wisner case* (p. 460):

"But it is contended that Beardsley was entitled to remove the case to the Circuit Court, and as by his petition for removal he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inasmuch as in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties."

It is said that here is a distinct declaration that "jurisdiction of the suit could not have obtained, even with the consent of both parties." There was no pretense of any consent on the part of the plaintiff in that case, and therefore this statement was unnecessary. In order, however, to prevent future misconception we add that nothing in the opinion in the *Wisner case* is to be regarded as changing the rule as to the effect of a waiver in respect to a particular court.

It may not be amiss to note that in several of the Circuit Courts and Courts of Appeal the *Wisner case* has been considered, and in all held that no change was intended by it. *Corwin M. Company* v. *Henrici Washer Company*, opinion by Lowell, Circuit Judge, 151 Fed. Rep. 938; *Louisville & Nashville Railroad Company* v. *Fisher*, 155 Fed. Rep. 68, Circuit Court of Appeals (Sixth Circuit), opinion by Lurton, Circuit Judge; *Shanburg* v. *F. & C. Co.*, Circuit Court of Appeals (Eighth Circuit), opinion by Riner, District Judge; *McPhee & McGinnity Company* v. *Union Pacific R. R. Co.*, Circuit Court of Appeals (Eighth Circuit), opinion by Sanborn, Circuit Judge. These two opinions are not yet published.

We might also refer to the several text books in which is affirmed the general doctrine of the effect of the waiver of an

objection to a particular court in which the suit has been brought or to which it has been removed. We have made these many quotations and references, not simply to establish the doctrine itself, but to emphasize the widespread injurious results which may be expected to follow from now enforcing a different rule; for, if in a case between citizens of different States, of which the Circuit Courts of the United States are given general jurisdiction, an objection to the jurisdiction of a particular one of those courts cannot be waived and no consent can give jurisdiction, it is clear that many judgments have been rendered by those courts in reliance upon such a waiver, which will necessarily be held to be absolutely void, and the litigation must be had over again in some other courts, resulting, possibly, in different decisions through the disappearance of witnesses, the loss of testimony, or the running of the statute of limitations.

The jurisdiction of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri was settled by the proceedings had by the two parties, and the application for a writ of mandamus is

Denied.

THE CHIEF JUSTICE dissenting.

The right of action was not vested in the next friend and the citizenship of the infant controls. The case is one, therefore, in which the plaintiff was a citizen and resident of the State of Illinois and the defendant a corporation created and existing under the laws of the State of Kentucky, and a citizen and resident of that State. The action was brought in the Circuit Court of the city of St. Louis, Missouri, of which State neither of the parties was a citizen. The fact that the next friend, who also acted as attorney-at-law for the minor, was a citizen of Missouri, is immaterial.

The question is whether, where neither of the parties is a citizen of the State in which the action is brought, the juris-

diction of the Circuit Court can be maintained if both parties consent to it. Jurisdiction of the Circuit Courts depends upon some act of Congress, *Stevenson* v. *Fain*, 195 U. S. 165, 167; *Turner* v. *Bank*, 4 Dall. 8, 10; *McIntire* v. *Wood*, 7 Cranch, 504, 506; and I quote at length from the opinion of Mr. Justice Gray in *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, because he therein examines the statutory provisions bearing on the question before us, saying (p. 446):

"In carrying out the provision of the Constitution which declares that the judicial power of the United States shall extend to controversies 'between citizens of different States,' Congress, by the Judiciary Act of September 24, 1789, c. 20, § 11, conferred jurisdiction on the Circuit Court of suits of a civil nature, at common law or in equity, 'between a citizen of the State where the suit is brought and a citizen of another State,' and provided that 'no civil suit shall be brought' 'against an inhabitant of the United States,' 'in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.' 1 Stat. 78, 79.

"The word 'inhabitant,' in that act, was apparently used, not in any larger meaning than 'citizen,' but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in the State, like the districts of Maine and Massachusetts in the State of Massachusetts, and the districts of Virginia and Kentucky in the State of Virginia, established by § 2 of the same act. 1 Stat. 73. It was held by this court from the beginning that an averment that a party resided within the State or the district in which the suit was brought was not sufficient to support the jurisdiction, because in the common use of words a resident might be a citizen, and therefore it was not stated expressly and beyond ambiguity that he was a citizen of the State, which was the fact on which the jurisdiction depended under the provisions of the Constitution and of the Judiciary Act. . . .

"By the act of May 4, 1858, c. 27, § 1, it was enacted that,

in a State containing more than one district, actions not local should 'be brought in the district in which the defendant resides,' or 'if there be two or more defendants residing in different districts in the same State,' then in either district. 11 Stat. 272. The whole purport and effect of that act was not to enlarge, but to restrict and distribute jurisdiction. It applied only to a State containing two or more districts; and directed suits against citizens of such a State to be brought in that district thereof in which they or either of them resided. It did not subject defendants to any new liability to be sued out of the State of which they were citizens, but simply prescribed in which district of that State they might be sued.

"These provisions of the acts of 1789 and 1858 were substantially reënacted in sections 739 and 740 of the Revised Statutes.

"The act of March 3, 1875, c. 137, § 1, after giving the Circuit Courts jurisdiction of suits 'in which there shall be a controversy between citizens of different States,' and enlarging their jurisdiction in other respects, substantially reënacted the corresponding provision of the act of 1789 by providing that no civil suit should be brought 'against any person,' 'in any other district than that whereof he is an inhabitant or in which he shall be found' at the time of service, with certain exceptions not affecting the matter now under consideration. 18 Stat. 470.

"The act of 1887, both in its original form and as corrected in 1888, reënacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: 'But where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' 24 Stat. 552; 25 Stat. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit

to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that 'where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides.' *McCormick Co.* v. *Walthers*, 134 U. S. 41, 43. And the general object of this act, as appears upon its face, and has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the Circuit Courts of the United States. *Smith* v. *Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Fisk* v. *Henarie*, 142 U. S. 459, 467.

"As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

Treating the clause that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant" as by way of proviso, that proviso must be regarded as excluding from the enacting clause "some possible ground of misinterpretation of it, as

extending to cases not intended by the legislature to be brought within its purview." *Minas* v. *United States*, 15 Pet. 445; *Austin* v. *United States*, 155 U. S. 417, 431.

Jurisdiction of the subject-matter is given only by law and cannot be conferred by consent, and, therefore, the objection that a court is not given such jurisdiction by law, if well founded, cannot, of course, be waived by the parties.

In my judgment, § 1, in cases where litigants are citizens of different States, confers jurisdiction only on the Circuit Court of the district of the plaintiff's residence and the Circuit Court of the district of the defendant's residence. And it is not conferred on the Circuit Court of the district of neither of them, and cannot be even by consent. If this were not so, as Mr. Justice Harlan said in *Bors* v. *Preston*, 111 U. S. 255, "it would be in the power of the parties by negligence or design to invest those courts with a jurisdiction expressly denied to them;" or where it may also be said, such jurisdiction was not expressly conferred. This view was expressed in *Ex parte Wisner*, 203 U. S. 449, and although it is true that the proposition need not have been there announced, because in that case it was correctly decided that there was not a consent to the jurisdiction by both parties, yet the rule was so laid down, and the result of the opinion in this case is to disapprove of and overrule *In re Wisner*, so far as that proposition is concerned. And as I adhere to that view I dissent.

But it should be added that this case was brought in a state court and removed by the defendant into the Federal court under the second section of the act of August 13, 1888, which provided "any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, which are now pending, or which may hereafter be brought in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being non-residents of that State." And it is settled that in order to make a suit removable under this part of the act it must be one

which the plaintiff could have brought originally in the United States Circuit Court. The right of removal given to the non-resident defendant or defendants by the second clause of § 2, removing the cause from the state court to the United States Circuit Court, is subject to the limitations of that clause that it must be a suit within the jurisdiction of such Circuit Court, and that it must be removed to the proper district, and therefore the act does not authorize him or them to remove it to the United States Circuit Court held in a district wherein that court was not given jurisdiction of the suit removed, or to any other judicial district in which the suit is not pending, as provided in § 3. Plaintiff brought his suit in a district wherein the defendant could not be sued in the Federal court within the meaning of the act. *Hill* v. *Woodland Amusement Company*, 158 Fed. Rep. 530.

The proper district within the meaning of the second clause of the second section means either of the districts made "proper districts" by the first section of the act, and when the third section requires the petition to be "for the removal of such suit into a Circuit Court to be held in the district where such suit is pending," it must have been contemplated that the suit would be pending in a "proper district." It is plain that the entire act is not to be construed as giving jurisdiction by reason of citizenship to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, that it restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen.